CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 314

FAIRMOUNT GLASS WORKS, PETITIONER,

vs.

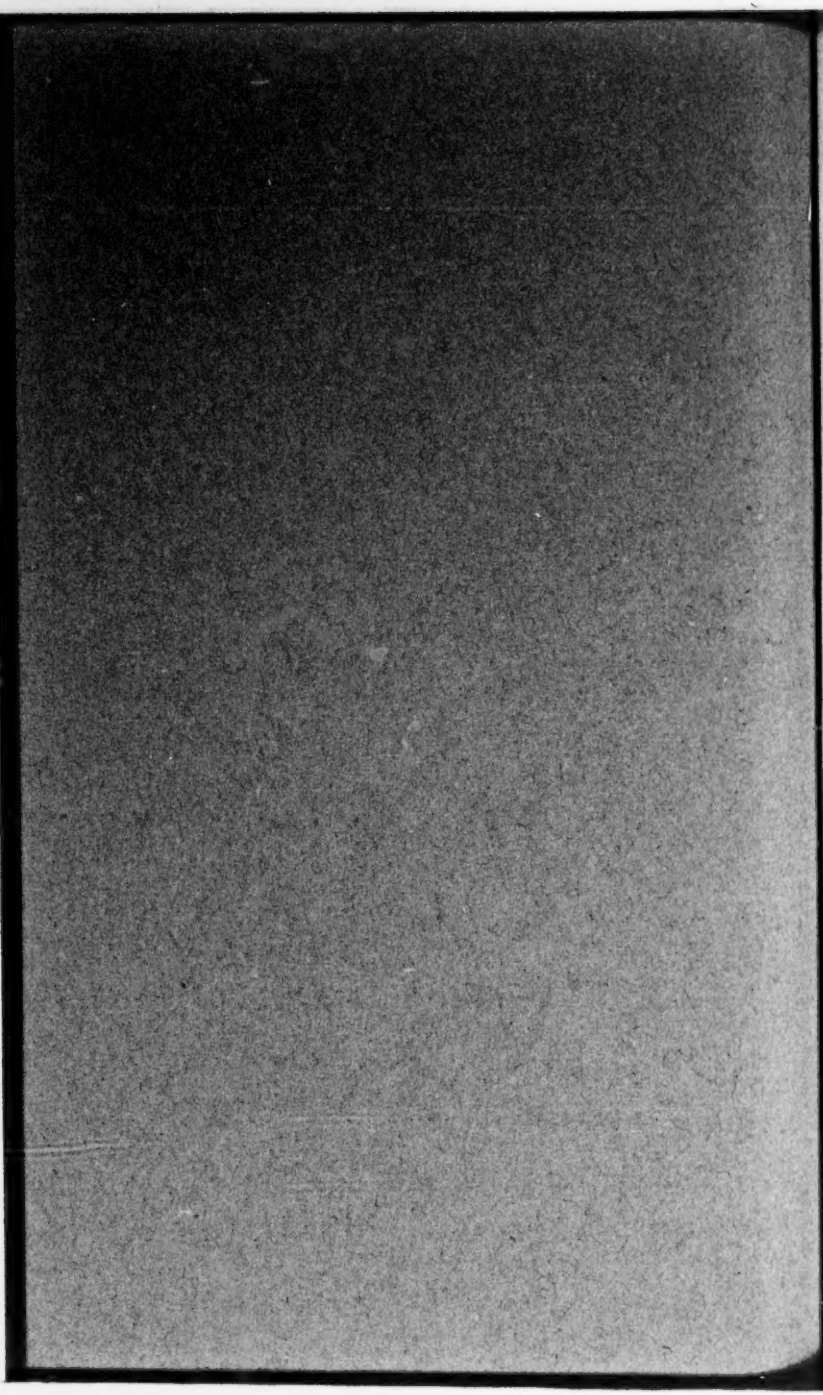
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(37,011)



IN THE

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OCTOBER TERM, A. D. 1931.

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Petitioner,

vs.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

CHARLES REMSTER, ESQ.,
HENRY H. HORNBROOK, ESQ.,
ALBERT P. SMITH, ESQ.,
PAUL Y. DAVIS, ESQ.,
KURT F. PANTZER, ESQ.,
Counsel for Petitioner.

CONNOR HALL, ESQ.,
Counsel for Respondents.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

OCTOBER TERM, A. D. 1930.

No. 4554

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,

Appellants,

vs.

FAIRMOUNT GLASS WORKS,

Appellee.

Counsel for Appellants:

MR. CONNOR HALL,

Counsel for Appellee:

MR. CHARLES REMSTER,
MR. HENRY H. HORNBROOK,
MR. ALBERT P. SMITH,
MR. PAUL Y. DAVIS,
MR. KURT F. PANTZER,

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

TRANSCRIPT OF RECORD FILED APR. 15, 1931.
PRINTED RECORD.

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

OCTOBER TERM, A. D. 1930.

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Appellants,

vs.

FAIRMOUNT GLASS WORKS,

Appellee.

Counsel for Appellants:

MR. CONNOR HALL,

Counsel for Appellee:

MR. CHARLES REMSTER,
MR. HENRY H. HORNBROOK,
MR. ALBERT P. SMITH,
MR. PAUL Y. DAVIS,
MR. KURT F. PANTZER,

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

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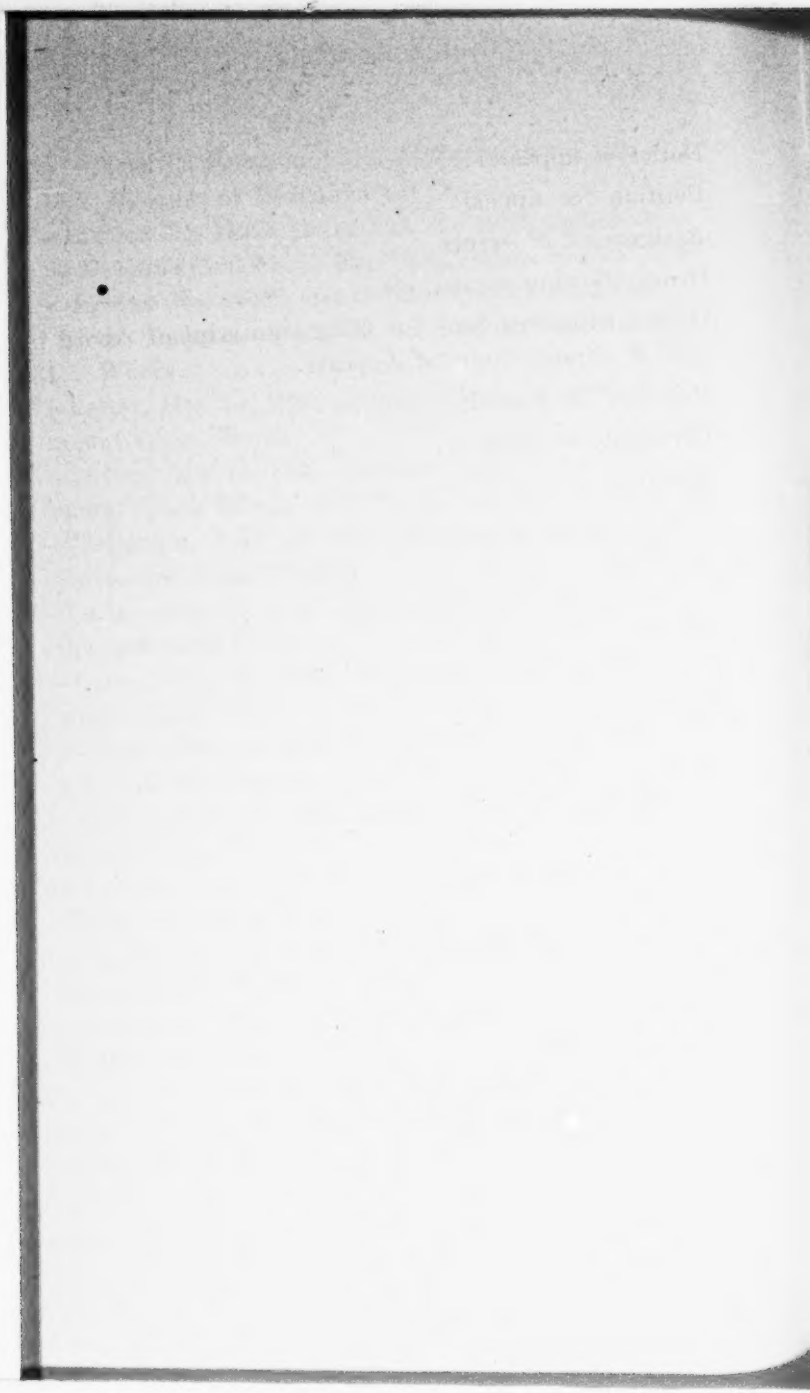

1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita

Cub Fork Coal Company, *et al.*
vs.
Fairmount Glass Works
} No. 8627, Law

Be It Remembered that heretofore to wit: at the May Term of said Court, on the 15th day of July, 1924, in Recess, the following proceedings in the above entitled cause were had, to wit:

Come now the plaintiffs by their attorneys, Clarence W. Nichols, Cannon Hall and Shirley, Whitcomb & Dowden, and file complaint in the above entitled cause, which complaint is in the words and figures following:

2 IN THE DISTRICT COURT OF THE UNITED STATES,

For the District of Indiana.

Cub Fork Coal Company, Paragon Colliery Company,
Plaintiffs,
vs.
Fairmount Glass Works,
Defendant.
} No. .....
At Law.

The plaintiffs, Cub Fork Coal Company and Paragon Colliery Company, complain of the Fairmount Glass Works, and complaining say that each of the plaintiffs is a corporation organized and existing under and by virtue of and in accordance with the laws of the State of West Virginia, and each of said plaintiffs is a citizen of said State of West Virginia, and has its principal office in the City of Huntington in said State of West Virginia; and that the defendant is a corporation organized and existing under and by virtue of and in accordance with the laws of the State of Indiana, and has its principal office in the City of Indianapolis, in said State of Indiana.

That the amount and sum in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

3 That on the 19th day of July, 1920, the plaintiffs and the defendant entered into a contract in writing, whereby the plaintiffs jointly sold and agreed to deliver to the defendant, and the defendant purchased and agreed to receive from the plaintiffs Seventeen Thousand and five hundred (17,500) tons of coal to be shipped, One Thousand (1000) tons per month in the month of July, 1920, and fifteen hundred (1500) tons per month during the months of August, September, October, November and December, 1920, and January, February, March, April, May and June, 1921, subject to the terms and conditions specified in said contract, the terms of said contract to commence with the execution thereof and to run to and include June, 1921.

That each of said plaintiffs, at the time said contract was made and prior thereto, and at all times thereafter until after July 1, 1921, owned and operated one or more coal mines

in the State of West Virginia, and was during all of said time engaged in the production of coal therefrom for the market; that said plaintiff, Paragon Colliery Company, so owned and operated two mines known and designated as Paragon Numbers One and Two, and said plaintiff, Cub Fork Coal Company, so owned and operated during said period a mine known and designated as "Cub Fork".

That at and long prior to the execution of said contract
4 W. E. Deegans Coal Company, a corporation organized and existing under and in pursuance to the laws of the State of West Virginia, was the duly authorized and acting agent of both plaintiffs for the sale of coal produced from the above mines, and each of them, and was duly authorized to contract in writing with purchasers and consumers of coal for the sale and delivery of the product of said Paragon and Cub Fork Mines, and was duly authorized to execute contracts for and on behalf of these plaintiffs in the name of said agent W. E. Deegans Coal Company; and that, as such agent, said W. E. Deegans Coal Company was authorized by plaintiffs to execute, for and in their behalf, and in the name and style of W. E. Deegans Coal Company, the contract above mentioned, and did so execute the same in manner and form hereafter set forth.

That said plaintiffs, immediately after the execution of said contract, duly approved and ratified said contract and all that their said agent had theretofore done with respect thereto, which approval and ratification was in words and figures following, to wit:

"We Paragon Colliery Company and Cub Fork Coal Company, hereby accept the obligation as shown in the contract on the reverse side, and agree to ship this coal according to the terms of same.

PARAGON COLLIERY COMPANY,
By W. E. DEEGANS,
President.
CUB FORK COAL COMPANY,
By W. E. DEEGANS,
President."

5 That the above and foregoing written approval and ratification was endorsed upon the back or reverse side of said contract above described, which was in words and figures following, to wit:

"Fairmount Glass Works,
Indianapolis, Ind.

Has this day bought of the W. E. Deegans Coal Company,
Huntington, W. Va.

Quantity:

17,500 Tons.

Grade:

Paragon or Cub Fork Egg (In case shipper is unable for any reason to deliver the full tonnage in Egg size, mine run will be accepted.)

Price:

$6.50 per net ton fob mines.

Terms:

Cash due and payable to the W. E. Deegans Coal Company, Huntington, W. Va., not later than the 10th of each month for shipments made in preceding month. Failure of the Buyer to comply with the terms of payment shall give the Seller the right to cancel this contract, but waiver of this right, in any instance, shall not prevent the subsequent exercise of it by the Seller. The right is especially reserved by the Seller to cancel this contract whenever the Seller has reason to believe the credit of the buyer is impaired.

Routing:

Available Open Route.

Delivery:

		Tons		Tons			Tons
1921	(April	1500	Aug.	1500		Dec.	1500
	(May	1500	Sept.	1500	1921	Jan.	1500
	(June	1500	Oct.	1500		Feb.	1500
1920	(July	1000	Nov.	1500		Mar.	1500

shipments made by the Seller to the Buyer during any one month shall constitute fulfillment (of this contract for
6 that month) and the tonnage herein contracted shall be cumulative only for such one-month period, except by mutual agreement.

Equipment:

Available. Flat Bottom preferred.

Expiration:

July 1sy, 1921.

Weights:

Actual railroad weights as ascertained on initial line by scale nearest loading point to govern all settlements. (a) This contract is made subject to strikes, accidents, car supply, Federal and State regulations, constraint of law and other causes beyond our control.

Conditions:

(b) The seller reserves the right to execute contracts for the sale of the entire estimated product of the mine, or mines controlled by the seller, and if the total actual output shall, at any time, for any cause, be less than the sum total of the deliveries called for by all of the Sellers' contracts then in force, the total available tonnage shall be applied pro rata, on all of said contracts alike, upon the basis of the percentage of the total tonnage available bears to the total tonnage contracted, and it is expressly agreed that such pro rata application of tonnage upon this contract shall be taken and understood to be a full performance of the sellers obligation to deliver hereunder.

(c) The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party, and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable
7 hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery, specified above, insofar as the labor, the physical condition of the respective plants and the ability of the carriers will permit, and subject to the terms and conditions above set forth.

(d) It is expressly understood that the price or prices named herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed.

Signed in duplicate this 19th day of July, 1920.

W. E. DEEGANS COAL COMPANY
By I. F. VASS,
Pres.

FAIRMOUNT GLASS WORKS,
By J. RAU,
President."

Plaintiffs further aver that said W. E. Deegans Coal Company on the 16th day of June 1924, duly assigned in writing to these plaintiffs all its right, title and interest in and to the foregoing contract and in and to any cause of action it had or might have had growing out of said contract and for damages arising out of the violation thereof by the defendant, which instrument of assignment was endorsed in the back of said contract and which is in words and figures following, to wit:

8 Know All Men By These Presents, That W. E. Deegans Coal Company, a corporation of the State of West Virginia, for value received, does hereby assign, transfer and set over to Paragon Colliery Company and Cub Fork Coal Company, both corporations of said State of West Virginia, all the right, title and interest of the said W. E. Deegans Coal Company in and to the within contract, and said W. E. Deegans Coal Company further hereby assigns and transfers to said Paragon Colliery Company and said Cub Fork Coal Company any and all rights and causes of action heretofore accrued, or hereafter to accrue, in favor of the assignor against Fairmount Glass Works, a corporation of the State of Indiana, for damages arising out of the failure of said Fairmount Glass Works to fully perform said contract, and any and all rights or causes of action heretofore accrued, or hereafter to accrue, upon or under said contract on any account whatever.

In Witness Whereof, the assignor has caused this instrument to be executed by its proper officers this 16th day of June, 1924.

W. E. Deegans Coal Company,
By W. E. Deegans,
President.

Attest:
A. W. Fitzwater,
Secretary."

9 Plaintiffs further aver that after the making of the contract said plaintiffs, as directed by the defendant, shipped and delivered through their said agent from time to time to said defendant, in compliance with the terms and conditions of said contract, certain quantities of coal, which the defendant accepted, received and paid for; but during the month of December, 1920, said defendant wrongfully and without just cause notified plaintiffs that it would not accept any further shipments of said coal unless expressly ordered

by it, and thereafter defendant never did order plaintiffs to make any further shipments of said coal under said contract, but wholly repudiated said contract and refused to accept any further shipments of coal thereunder.

That plaintiffs were at all times ready and willing to ship and deliver to the defendant all the coal specified in said contract to be delivered by them to said defendant under the terms thereof, and did so ship and deliver said coal as stipulated in said contract until the repudiation thereof by said defendant, as heretofore alleged, except that in the month of July, 1920, 632.5 tons were shipped; in August, 1920, 1052 tons were shipped; in October, 1920, 900.2 tons were shipped; in September 1920, 1616.15 tons were shipped; and in November, 1920, 2039.5 tons were shipped.

10 That during the months of July, August and October, 1920, the full amount of One thousand (1000) tons in July and fifteen hundred (1500) tons in each of the months of August and October would have been shipped by these plaintiffs to the defendant but for the fact that during the period aforesaid upon the Chesapeake & Ohio Railroad, the only common carrier transporting coal from the said mines, there existed and continued a great deficiency in coal cars, that is to say, that during the period aforesaid the said Chesapeake & Ohio Railroad Company could not and did not furnish to these plaintiffs more than one-half the number of cars required for the transportation of the coal from their mines, and at times during said period not more than twenty-five per cent. of its requirements, although these plaintiffs requested of the Chesapeake & Ohio Railroad Company sufficient cars to transport all the coal produced from their said mines.

That these plaintiffs were further prevented from shipping the full stipulated quantity of coal in the months of July, August and October, 1921, by reason of the fact that on the 9th day of June, 1920, the Interstate Commerce Commission of the United States made and issued Service Order Number 5, which, reciting a shortage of equipment and congestion of traffic upon the lines of a large number of railroads, including the Chesapeake & Ohio Railroad, ordered that in the

11 transportation of bituminous coal consigned to Lake Erie Ports for transshipment by water, either as cargo or bunkerage coal, including the supply of cars therefor and the movement of such traffic, preference and priority should be

given to bituminous coal consigned to H. M. Griggs, Cleveland, Ohio, which said Order continued in full force and effect until the 11th day of April, 1921.

That said Interstate Commerce Commission on the 13th day of July, 1920 made and issued Service Order Number 9, providing that all common carriers by railroad within the territory embracing the said mines of the plaintiffs should in the transportation of coal give preference to public utilities, including street and interurban railways, electric power and lighting plants, gas plants, ice plants, water and sewer works, also hospitals, schools, and other public institutions, so that the same might be kept supplied with coal for current use.

That by further order made and issued by the Interstate Commerce Commission on the 20th day of July, 1920 and designated Service Order Number 10, it was further provided that in the transportation of coal by railroads, including the Chesapeake & Ohio Railroad, preference should be given to H. M. Griggs, Cleveland, Ohio, which said order likewise remained in full force and effect until the 11th day of April, 1921.

That said Interstate Commerce Commission on the
12 16th day of September, 1920, made and issued a further order designated Service Number 16, further providing that common carriers by railroad, including the Chesapeake & Ohio Railroad, within the territory embracing said mines of the plaintiffs, should give preference in the transportation of coal to said public utilities, street and interurban railroads and other companies hereinbefore mentioned.

That by reason of the said congestion of traffic and governmental interference through orders made and issued by the Interstate Commerce Commission, as aforesaid, the plaintiffs were disabled and prevented from shipping the full quantities specified during the said three months, 1000 tons in July and 1500 tons in each of the months of August and October, 1920.

That at all times during the period covered by said contract prior to the repudiation thereof by the defendant, plaintiffs shipped to the defendant, and the defendant received a larger proportion of coal than was shipped to other purchasers of coal contracted to be furnished by plaintiffs during said period from mines controlled by plaintiffs in proportion to the tonnage agreed to be shipped under the contract of plaintiffs with defendant aforesaid, and except as prevented

by caused wholly beyond the power and control of plain-
13 tiffs, as above set forth, shipped to defendant each month of said period the tonnage agreed to be shipped by the terms of said contract.

Plaintiffs further aver that notwithstanding plaintiffs' inability to ship the full amount of coal specified under said contract from month to month, and notwithstanding the defendant's failure to receive the same, defendant continued from time to time thereafter to request further shipments, and in all respects recognized said contract as continuing in force until defendant learned that because of sharp declines in the coal market and in the consumption of coals similar to those purchased by the plaintiffs, it could obtain an adequate supply at prices greatly below the price agreed to be paid plaintiffs under said contract; and thereby said defendant waived its right, if it ever had any such right, to discontinue or terminate said contract because of the inability or failure of plaintiffs to ship the full quantity of coal agreed to be shipped during each of said months.

That the real motive and reason actuating defendant in attempting to repudiate its obligations under said contract, and in refusing to receive and pay for further shipments of coal was the sharp decline in the market price of coal to a
14 point below the contract price, and that in repudiating said contract defendant notified plaintiffs that it could buy coal at a lower price than that agreed to be paid to plaintiffs under said contract.

Plaintiffs further aver that the cost per ton of coal produced in the mines mentioned in said contract, as in bituminous coal mines generally, depends very greatly upon the amount of production during any given period, and that when the normal production is reduced the cost per ton is greatly increased.

That is was wholly impracticable for plaintiffs to discontinue the operation of their said mines during the period covered by said contract, for the reason that the same are subject to the inflow of water and obstruction of the passageways and rooms where said coal is mined due to falling roofs which can only be prevented by constant removal of such obstructions in the ordinary course of operation, and that during such period of suspension or shut-downs in the operation of said mines Plaintiffs would be compelled to maintain a large force of men, machinery, and equipment in removing such inflow of water and obstructions, which, together with

the necessary fixed charges of said Company, would cause a net loss largely in excess of plaintiffs' entire demand in this case.

That plaintiffs had during the period covered by said
15 contract a large number of outstanding contracts requiring them to produce and deliver large quantities of coal to consumers other than said defendant, and that they were compelled to and did keep their said mines in operation during the whole of said period to prevent the physical deterioration of said mines in the manner above described, and also to enable them to fulfill their other outstanding obligations which they would have been unable to perform if they had not continued the operation of said mines during said period.

That the additional cost of producing the Ten Thousand Four hundred (10,400) tons of coal remaining to be taken by the defendant under the contract in the month of December, 1920, and the months of January, February, March, April, May and June, 1921, did not exceed $2.00 per ton.

That during the period beginning December 4th, 1920, and ending July 1st, 1921, the plaintiffs produced from their said mines, in addition to all coal previously sold or contracted for, coal of a kind and quality contracted for by defendant largely exceeding fifteen hundred (1500) tons per month.

That plaintiffs were compelled to sell the coal so produced during said period in excess of that previously contracted for, and did sell the same upon the open market as produced
16 at prices during the respective months included in said period as follows, to wit:

December,	1920	$5.75	per ton
January,	1921	4.15	" "
February,	1921	3.50	" "
March,	1921	3.00	" "
April,	1921	2.75	" "
May,	1921	2.75	" "
June,	1921	2.75	" "

That the total sum realized from the coal which defendant agreed to accept and pay for under said contract, but which it refused to accept as aforesand, was $35,183.00, which was the total market value thereof when sold f. o. b. Plaintiffs' mines, whereas if said defendant had received and paid for the same at the contract price plaintiffs would have received the total sum of $67,600.00.

Plaintiffs aver that they have been damaged by reason of

the defendant's breach of said contract in the total sum of $32,417.00, with interest thereon from March 1st, 1921.

Wherefore, plaintiffs pray judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars, and proper relief.

CLARENCE W. NICHOLS
CONNOR HALL
SHIRLEY, WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

17 (Entry for July 15, 1924, continued)

And thereupon there issued out of the office of the Clerk of said Court, a writ of summons for the said defendant, which writ of summons was on this 15th day of July, 1924, delivered to the United States Marshal for this District.

18 And afterwards to wit: at the May Term of said Court, on the 23rd day of September, 1924, in Recess, the following further proceedings were had herein to wit:

Comes now the defendant by its attorneys, and files motion to separate causes of action, which motion is in the words and figures following:

19 * * (Caption) * *

MOTION TO SEPARATE CAUSES OF ACTION.

Defendant respectfully moves the Court to require plaintiff to separate into two paragraphs of complaint, each separately numbered, and to embody separately in each of such separate paragraphs, the two causes of action stated in plaintiffs' complaint herein, viz: one alleged cause of action as assignee of the rights of W. E. Deegans Coal Company under the contract set out in said complaint, and one alleged cause of action as original parties to said contract, for the reason that plaintiffs have alleged in said complaint that they, as undisclosed principals, are entitled to bring action upon said contract, and have also alleged that they as assignees of W. E. Deegans Coal Company are entitled to bring action on said contract; and each of said alleged causes of action involves different issues of fact and law as to the execution of said contract, and

different issues of fact and law as to the performance thereof, and defendant is entitled to have such different causes of action separately stated in order that it may plead separately thereto.

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys for Defendant.

20 And afterwards to wit: at the May Term of said Court on the 27th day of September, 1924, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings were had herein to wit:

Come now the plaintiffs by their Solicitors, and file notice, which notice is in the words and figures following:

By leave of Court first had and obtained, plaintiffs file amendment to the complaint, which amendment is in the words and figures following:

21 * * (Caption) * *

Plaintiffs, by leave of Court first had and obtained, hereby amend the Complaint by inserting immediately after the words and figures "the total sum of $67,600.00" and immediately preceding the words "Plaintiffs aver that they have been damaged" all on the last page of said Complaint, the following words, to wit: "Plaintiffs aver that except as hereinbefore otherwise alleged, they performed each and all the terms, conditions and obligations of said contract on their part agreed to be performed."

CONNOR HALL
CLARENCE NICHOLS
SHIRLEY, WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

22 And afterwards to wit: at the November Term of said Court, on the 21st day of March, 1925, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above entitled cause were had, to wit:

Comes now the defendant by its Attorneys, and files answer to complaint, which answer is as follows:

23 * * (Caption) * * Fi

ANSWER OF DEFENDANT.

Paragraph I.

The defendant, answering the complaint herein, for a first paragraph of answer, denies each and every allegation therein contained.

Paragraph II.

The defendant, answering the complaint herein, for a second paragraph of answer, alleges:

That the contract set out in plaintiffs' complaint contains the following provision, to wit:

"It is expressly understood that the price or prices named herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed."

That prior to the defendant's alleged breach of such contract in the complaint mentioned the rates of pay for
24 mine labor at plaintiffs' mines were increased, and plaintiffs notified defendant of such increase and notified defendant that all coal shipped thereafter would be invoiced at a price in excess of that named in said contract, and that defendant refused to consent to such increase in price.

That by reason of the foregoing, the obligation of plaintiffs to ship and defendant to receive further coal under said contract was rendered indefinite as to price; that no readjustment of said price was ever agreed upon by plaintiffs and defendant; and that from the time of said increase in rates of pay for mine labor said contract became unenforceable and the mutual obligations thereunder of both parties ceased.

Wherefore, defendant demands judgment.

Paragraph III.

The defendant, answering the complaint herein, for a third paragraph of answer, alleges:

That prior to and at the time of entering into the contract in plaintiffs' complaint set out, defendant was engaged in the business of the manufacture of glass at its plant at Indianap-

olis, Indiana; that plaintiffs' agents had, prior to entering into said contract, visited said plant, knew the manner of operation thereof, and the facilities there available for the receipt and storage of coal; that the defendant, to the plaintiffs' knowledge, negotiated for said contract in order that the coal covered thereby might be used in the operation of such plant; and that the plaintiffs, thereupon, caused the contract to be executed upon a printed form prepared by them which contained the following provision:

25 "The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party, and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery, specified above, insofar, as the labor, the physical condition of the respective plants and the ability of the carriers will permit, and subject to the terms and conditions above set forth."

That during the months of July and August, 1920, plaintiffs failed to ship to defendant the 1500 tons of coal per month provided to be shipped by the contract in suit, but shipped to defendant a lesser quantity, not exceeding 900 tons per month, giving as excuses for such deficiency that there was a shortage of cars and that the lake quota from mines in the Kanawha district had been increased and plaintiffs had been compelled to ship practically all paragon coal to the lakes; that plaintiffs shipped to defendant not exceeding 1600 tons of coal for the month of September, 1920, and again fell short in October, 1920, when plaintiffs shipped not exceeding 900 tons of coal; that by such course of undershipment, as well as by their letters, plaintiffs caused defendant reasonably to believe

26 that defendant could not rely upon plaintiffs for the amount of coal which said contract provided to be shipped in any month; that defendant, in reasonable anticipation of the amount of coal that would be necessary for the operation of defendant's manufacturing plant, began toward the middle of September, 1920, to order and purchase coal elsewhere, such orders and purchases continuing through October and into November, 1920; that as a result defendant purchased from others than plaintiffs, for shipment to defendant during such period, 3505 tons of coal, which was no more than was

reasonably anticipated to be necessary to supply the deficiency in plaintiffs' deliveries reasonably to be anticipated from the circumstances aforesaid; and that said coal so purchased was shipped to defendant during such period.

That contrary to defendant's reasonable anticipation aforesaid, and after defendant had contracted to purchase coal from others as aforesaid and without plaintiffs' notifying defendant that the alleged conditions affecting plaintiffs' ability to ship coal had in any wise changed, the market price of coal having meanwhile unexpectedly declined, plaintiffs shipped to defendant during the month of November, 1920, a much larger quantity of coal than plaintiffs were entitled to ship and deliver under said contract, to wit, 2039 tons, and in consequence thereof the available facilities for receiving and storing coal at defendant's aforesaid plant were filled and exhausted, and such condition existed upon the fourth day of December, 1920, when defendant notified plaintiffs, as alleged in plaintiffs' complaint that it would not accept further coal unless expressly ordered.

That a such time the physical condition of defendant's
27 said plant was such that it could not receive or store any further coal without great and prohibitive expense, and it was not possible profitably to operate said plant and use coal owing to causes wholly beyond the defendant's control; of all of which defendant advised plaintiffs, and on account of which defendant notified plaintiffs that it would not accept more coal until further orders, as in the complaint alleged.

That the aforesaid physical conditions preventing the receipt and delivery of coal at defendant's plant continued for a long time thereafter, to wit: until the 30th day of March, 1921, and plaintiffs never, after said 30th day of March, 1921, offered to ship coal to defendant under said contract, and defendant never thereafter refused to accept coal thereunder.

Wherefore, defendant demands judgment.

Paragraph IV.

The defendant, answering the complaint herein, for a fourth paragraph of answer, alleges:

That prior to the time of entering into the contract in plaintiffs' complaint set out, defendant had certain conferences and correspondence with the W. E. Deegans Coal Company of Huntington, West Virginia, regarding the advisability of entering into such contract; that said W. E. Deegans Coal

Company of Huntington, West Virginia, is a corporation organized and existing under and pursuant to the laws of the State of West Virginia, and is the same W. E. Deegans Coal Company in the complaint mentioned; that in such conferences and by such correspondence the defendant stated and em-
28 phasized that it was negotiating with the said W. E. Deegans Coal Company on the assumption that said Coal Company was the owner of the mines furnishing the Paragon and Cub Fork coal eventually contracted for in said contract; that the defendant desired particularly to contract for its annual supply of coal with a party owning and operating mines capable of supplying the defendant's requirements, because such a relationship promised to guarantee surer delivery of coal; that the defendant did not desire to contract with any one not owning and operating the mines producing the coal to be delivered and so informed said W. E. Deegans Coal Company and its agents representing it in said negotiations; that the W. E. Deegans Coal Company and its agents representing it in said negotiations thereupon represented to the defendant that it was the owner of the mines producing the Paragon and Cub Fork coal mentioned in said contract; and that relying upon said representation, the defendant thereupon was induced to and did execute the contract in the complaint mentioned.

That the representation as to the ownership of the mines producing said Paragon and Cub Fork coal, was a material representation upon which the defendant relied in entering upon said contract; and that the defendant would not have executed said contract had it been informed of the fact (which fact actually was the case) that the W. E. Deegans Coal Company was not the owner of said mines but that said Company was acting throughout said negotiations and in the execution of said contract as the agent of the plaintiffs herein, its two undisclosed principals.

That the said W. E. Deegans Coal Company and its agents representing it in said negotiations, knew that it was not the owner of said mines producing the Paragon and Cub Fork
29 coal in the contract mentioned.

That as a result of said misrepresentation, the plaintiffs herein are not entitled, as a matter of law, to avail themselves of the principle of undisclosed principal in bringing suit in their own names upon a contract executed by the W. E. Deegans Coal Company in its name, even though said W. E. Deegans Coal Company should, throughout said negotiations adn at the time of the execution of said contract, have been

acting for and on behalf of the plaintiffs herein, and even though said plaintiffs should have authorized the W. E. Deegans Coal Company to act for and on its behalf in the execution of said contract, and should, after execution, have ratified the same.

That as a result of said misrepresentation, the said W. E. Deegans Coal Company is not entitled, as a matter of law, to a cause of action upon said contract fraudulently induced, as hereinabove set forth, and that its assignee by instrument of assignment, as in the complaint set forth, is likewise not entitled to maintain a cause of action thereon.

Wherefore, defendant demands judgment.

Paragraph V.

The defendant, answering the complaint herein, for a fifth paragraph of answer, alleges:

That for a period prior to the execution of the contract in plaintiffs' complaint set out, beginning March 11, 1919, the defendant and the W. E. Deegans Coal Company of Huntington, West Virginia, a corporation organized and existing under and pursuant to the laws of the State of West Virginia, being the same W. E. Deegans Coal Company in the complaint mentioned, had enjoyed relations in the purchase and sale, respectively, of coal, and that on April 21, 1919, said defendant and the said W. E. Deegans Coal Company entered into a contract for the purchase and sale of 15,000 tons of egg coal, to be shipped in equal monthly shipments of 1259 tons per month, beginning July 1, 1919, and ending June 30, 1920, which contract was in the words and figures following, to wit: (The part hereinafter set forth in italics appearing in said contract in pen and ink, and the part hereinafter set forth in ordinary type, appearing in said contract in printing).

"*4-21-1919*

Fairmont Glass Works
Indianapolis, Ind.

Has this day bought of the W. E. Deegans Coal Company, Huntington, W. Va.

Quantity: 15000 Tons) *To be shipped in about equal monthly*
) *shipments of 1250 tons beginning*
) *July 1st 1919 ending June 30, 1920,*
Grade: *Egg Coal*) *as per shipping instructions fur-*
) *nished by buyer.*

Price: *$2.35. Per Ton F. O. B. Mines.*

Terms: Cash due and payable to the W. E. Deegans Coal Company, Huntington, W. Va., not later than the 15th of each month for shipments made in preceding month.

Routing: *% Indpl's Union Ry. Track #180.*

	Tons		
Delivery	April	October	
	May	November	
	June	December	
	July	January	
	August	February	
	September	March	

31 Equipment: *Flat Bottom Cars.*

Expiration: *June 30-1920.*

Weights: Actual railroad weights as ascertained on initial line by scale nearest loading point to govern all settlements. This contract is made subject to strikes, accidents, car supply, Federal and State regulations, constraint of law and other causes beyond our control.

The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party; and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified above, insofar as the labor, the physical conditions of the respective plants

and the ability of the carriers will permit, and subject to the terms and conditions above set forth.

Signed in duplicate this *21st* day of *April 1919.*

W. E. DEEGANS COAL COMPANY
By *I. F. Vass,*
Pres.

Fairmount Glass Works
By *J. Rau*
Pres."

That said contract, like the contract in the complaint contained, was executed on a form prepared by the W. E. Deegans Coal Company, and that it contained certain provisions which are identical with the provisions set forth under
32 the headings "Weights" and "Conditions," subparagraphs (a) and (c), in the contract in the complaint mentioned.

That the W. E. Deegans Coal Company, in carrying out said contract dated April 21, 1919, experienced great difficulty and sustained pecuniary loss because of the rise in prices of coal during the term of said contract; that during the term of said contract, said W. E. Deegans Coal Company experienced further difficulty, due to embargos, car shortages and other matters, partly within and partly without the control of said Company; that as a result of such difficulties, it fell in arrears as to its obligations under said contract and carried out the conditions actually performed by it only at great inconvenience to the defendant, and at considerable loss to said the W. E. Deegans Coal Company.

That at the time that the defendant and the W. E. Deegans Coal Company entered into negotiations with regard to the execution of the contract in the complaint mentioned, dated July 19, 1920, said W. E. Deegans Coal Company insisted that any contract entered into by it for delivery of coal by it to the defendant from and after June 30, 1920, would have to contain the conditions that shipments made thereunder should be made at the prevailing market price at the time of shipment, and that such contract would be subject to cancellation by the said W. E. Deegans Coal Company under certain conditions.

That the defendant thereupon insisted upon obtaining a contract with a fixed price per ton for the period of such contract, and with definite commitments as to delivery
33 by the said W. E. Deegans Coal Company; but that the said W. E. Deegans Coal Company refused to enter into

any contract with such commitments and obligations and insisted upon the defendant's signing a contract upon the printed form provided by it, as set out in the complaint, which contained the following three clauses in addition to those found in the contract dated April 21, 1919:

"Shipments made by the seller to the buyer during any one month shall constitute fulfillment of this contract for that month, and the tonnage herein contracted shall be cumulative only for such one-month period, except by mutual agreement."

* * * * * *

"(b) The seller reserves the right to execute contracts for the sale of the entire estimated product of the mine, or mines controlled by the seller, and if the total actual output shall, at any time, for any cause be less than the sum total of the deliveries called for by all of the sellers' contracts then in force, the total available tonnage shall be applied, pro rata, on all of said contracts alike, upon the basis of the percentage the total tonnage available bears to the total tonnage contracted; and it is expressly agreed that such pro rata application of tonnage upon this contract shall be taken and understood to be a full performance of the sellers obligation to deliver hereunder.

* * * * * *

"(d) It is expressly understood that the price or prices named herein are based on existing rates of pay for all
34 mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed."

That it was the intention of said W. E. Deegans Coal Company, by inserting said clauses in said contract, to exonerate itself from liability for failure to ship coal under said contract, no matter for what cause, and to exonerate itself from all liability due to changes in the existing rates of pay for mine labor.

That as a result of the insertion of said clauses in said contract, said W. E. Deegans Coal Company exonerated itself from all liability for failure to perform the same, such exoneration resulting in lack of mutuality whereby said contract is rendered null and void.

Wherefore, defendant demands judgment.

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys for Defendant.

35 (Entry for March 21, 1925 continued)

Also files counter claim, which counter claim is as follows:

36 * * (Caption) * *

COUNTER CLAIM OF DEFENDANT.

The defendant, Fairmount Glass Works, for counter claim against the plaintiff herein alleges that on July 19, 1920, the defendant and W. E. Deegans Coal Company, a corporation organized and existing under the laws of the State of Virginia, entered into a certain written contract which is the same contract set out in the plaintiffs' complaint herein; that said contract was drawn up by said W. E. Deegans Coal Company; that said Coal Company entered into said contract with the defendant for and on behalf of the plaintiffs who were its undisclosed principals under the explicit authorization of whom the W. E. Deegans Coal Company was acting in the negotiation and execution of said contract; and that said contract was in the words and figures following to wit:

"Fairmount Glass Works,
Indianapolis, Ind.

Has this day bought of the W. E. Deegans Coal Company, Huntington, W. Va.

Quantity:

17,500 Tons.

37 Grade:

Paragon or Cub Fork Egg. (In case shipper is unable for any reason to deliver the full tonnage in Egg Size, mine run will be accepted.)

Price:

$6.50 per net ton fob mines.

Terms:

Cash due and payable to the W. E. Deegans Coal Company, Huntington, W. Va., not later than the 10th of each

month for shipments made in preceding month. Failure of the Buyer to comply with the terms of payment shall give the Seller the right to cancel this contract, but waiver of this right, in any instance, shall not prevent the subsequent exercise of it by the Seller. The right is especially reserved by the Seller to cancel this contract whenever the Seller has reason to believe the credit of the buyer is impaired.

Routing:

Available. Open Route

Delivery:

		Tons		Tons			Tons
1921	April	1500	Aug.	1500		Dec.	1500
	May	1500	Sept.	1500	1921	Jan.	1500
	June	1500	Oct.	1500		Feb.	1500
1920	July	1000	Nov.	1500		Mar.	1500

Shipments made by the seller to the buyer during any one month shall constitute fulfillment of this contract for that month and the tonnage herein contracted shall be cumulative only for such one-month period, except by mutual agreement.

Equipment:

Available. Flat Bottoms preferred.

Expiration:

July 1st, 1921.

Weights:

Actual railroad weights as ascertained on initial line by scale nearest loading point to govern all settlements.

38 Conditions:

(a) This contract is made subject to strikes, accidents, car supply, Federal and State regulations, constraint of law and other causes beyond our control.

(b) The seller reserves the right to execute contracts for the sale of the entire estimated product of the mine, or mines controlled by the seller, and if the total actual output shall, at any time, for any cause, be less than the sum total of the deliveries called for by all of the sellers' contracts then in force, the total available tonnage shall be applied, pro rata, on all of said contracts alike, upon the basis of the percentage the total tonnage available bears to the total ton-

nage contracted; and it is expressly agreed that such pro rata application of tonnage upon this contract shall be taken and understood to be a full performance of the sellers obligation to deliver hereunder.

(c) The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party; and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified above, insofar as the labor, the physical conditions of the respective plants and the ability of the carriers will permit, and subject to the terms and conditions above set forth.

(d) It is expressly understood that the price or prices named herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed.

39 Signed in duplicate this 19th day of July 1920.

W. E. Deegans Coal Company,
By I. F Bass,
Pres.

Fairmount Glass Works
By J Rau
President"

That by the terms of said contract the plaintiffs agreed to sell and ship to the defendant 17,500 tons of coal, paragon or cub fork egg, or in case the plaintiffs should be unable to deliver egg coal then mine run coal at and for the price of $6.50 per ton fob mines; and that said coal was to be shipped to the defendant in monthly instalments as follows, to wit: 1000 tons in the month of July, 1920, and 1500 tons in each succeeding month including the month of June, 1921.

That although the defendant was at all times ready, able and willing to receive and pay for the monthly instalments of coal deliverable by the plaintiffs as aforesaid during the months of July, August, September, October and November, 1920, and so notified the plaintiffs and requested the plaintiffs to deliver said monthly instalments, the plaintiffs in violation of the terms of said contract shipped to the defendant during July and August, 1920, not to exceed 900 tons of

coal per month; during the month of September, 1920, not to exceed 1600 tons of coal and during the month of October, 1920, not to exceed 900 tons of coal; that the defendant repeatedly notified the plaintiffs of the defendant's need for coal in equal monthly instalments as provided by said contract and informed the plaintiffs that if such regular monthly supply could not be relied upon the defendant would have to go elsewhere to secure such supply; that the
40 total shortage of coal in July, August, September and October, 1920, with regard to the actual amount which the plaintiffs had contracted to deliver was 1700 tons; and that the market value of said coal which the plaintiffs so failed to deliver to the defendant in July, August and October, 1920, was $7.50 per ton.

That the defendant has been damaged by the plaintiffs' failure to deliver the regular monthly instalments of coal as by said contract stipulated in the sum of $2000.00.

Wherefore, the defendant prays judgment against the plaintiffs for $2000.00 and all other proper relief.

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys for defendant.

Dated March 21, 1925.

41 And afterwards to wit: at the November Term of said Court, on the 24th day of April, 1925, before the Honorable Robert C. Baltzell Judge of said Court, the following further proceedings were had herein to wit:

Come now the plaintiffs by their attorneys, and file reply to defendants answer in two paragraphs, which reply is as follows:

42 * * (Caption) * *

PLAINTIFFS' REPLY.

Paragraph I.

Plaintiffs, replying to each the second, third, fourth and fifth paragraphs of the defendant's answer, for their first paragraph of reply, deny each and every allegation contained in each of said respective paragraphs of answer.

Paragraph II.

For a second and further paragraph of reply to the second paragraph of defendant's answer, plaintiffs admit that prior to the defendant's breach of the contract sued on, the rates of pay for mine labor at plaintiffs' mines were increased and that plaintiffs notified defendant of such increase and that all coal shipped thereafter under said contract would be invoiced at a price in excess of that named in said contract and that defendant refused to consent to such increase
43 in price.

But plaintiffs aver that notwithstanding such increase in the rates of pay for mine labor at plaintiffs' mines, which plaintiffs were compelled to pay and did pay for producing all coal shipped from the time they notified said defendant of such increase as alleged in defendant's said second paragraph of answer, and notwithstanding the provision of the contract sued on quoted in said second paragraph of answer, plaintiffs upon defendant's refusal to consent to any increase in the price of said coal, to which it had agreed by the terms of said contract, waived their right to such increased price and continued to ship and invoice said coal to said defendant at the price designated in said contract, without any additional charge whatever, which coal so shipped was accepted by said defendant without further objection.

Wherefore plaintiffs demand judgment as prayed in their complaint.

CONNOR HALL
CLARENCE NICHOLS
SHIRLEY, WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

44 (Entry for April 24, 1925 Continued)

And also files answer to defendant's counter claim, which answer is as follows:

45 • • (Caption) • •

PLAINTIFFS' ANSWER TO DEFENDANT'S COUNTER CLAIM.

Paragraph I.

The plaintiffs, answering the counter claim of defendant, for their first paragraph of answer thereto deny each and every allegation in said counter claim contained.

Paragraph II.

For a second and further paragraph of answer to the defendant's counter claim, plaintiffs aver that among the provisions of the contract sued on, are the following:

Conditions: (a) This contract is made subject to strikes, accidents, car supply, Federal and State regulations, constraint of law and other causes beyond our control.

(b) The seller reserves the right to execute contracts for the sale of the entire estimated product of the mine, or mines controlled by the seller, and if the total output shall, at
46 any time, for any cause, be less than the sum total of the deliveries called for by all of the sellers' contracts then in force, the total available tonnage shall be applied, pro rata, on all of said contracts alike, upon the basis of the percentage the total tonnage available bears to the total tonnage contracted; and it is expressly agreed that such pro rata application of tonnage upon this contract shall be taken and understood to be a full performance of the sellers obligation to deliver hereunder.

(c) The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party; and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified above, insofar as the labor, the physical conditions of the respective plants and the ability of the carriers will permit, and subject to the terms and conditions above set forth."

Plaintiffs further aver that after the making of the contract, said plaintiffs, as directed by the dedendant,
47 shipped and delivered through their said agent from time to time to said defendant, in compliance with the terms and conditions of said contract, certain quantities of coal, which the defendant accepted, received and paid for; but during the month of December, 1920, said defendant wrongfully and without just cause notified plaintiffs that it would not accept any further shipments of said coal unless expressly ordered by it, and thereafter defendant never did order plaintiffs to make any further shipments of said coal under said contract, but wholly repudiated said contract and refused to accept any further shipments of coal thereunder.

That plaintiffs were at all times ready and willing to ship and deliver to the defendant all the coal specified in said contract to be delivered by them to said defendant under the terms thereof, and did so ship and deliver said coal as stipulated in said contract until the repudiation thereof by said defendant, as heretofore alleged, except that in the month of July, 1920, 632.5 tons were shipped; in August, 1920, 1052 tons were shipped; in October, 1920, 900.2 tons were shipped; in September 1920, 1616.15 tons were shipped; and in November, 1920, 2039.5 tons were shipped.

That during the months of July, August and October, 1920, the full amount of One thousand (1000) tons in July and Fifteen hundred (1500) tons in each of the months of August and October would have been shipped by these plaintiffs to
48 the defendant but for the fact that during the period aforesaid upon the Chesapeake & Ohio Railroad, the only common carrier transporting coal from the said mines, there existed and continued a great deficiency in coal cars, that is to say, that during the period aforesaid the said Chesapeake & Ohio Railroad Company could not and did not furnish to these plaintiffs more that one-half the number of cars required for the transportation of the coal from their mines, and at times during said period not more than twenty-five per cent. of its requirements, although these plaintiffs requested of the Chesapeake & Ohio Railroad Company sufficient cars to transport all the coal produced from their said mines.

That these plaintiffs were further prevented from shipping the full stipulated quantity of coal in the months of July, August and October, 1921, by reason of the fact that on the 9th day of June, 1920, the Interstate Commerce Commission of the United States made and issued Service Order

Number 5, which, reciting a shortage of equipment and congestion of traffic upon the lines of a large number of railroads, including the Chesapeake & Ohio Railroad, ordered that in the transportation of bituminous coal consigned to Lake Erie Ports for transshipment by water, either as cargo or bunkerage coal, including the supply of cars therefor and the movement of such traffic, preference and priority should be given to bituminous coal consigned to H. M. Griggs, Cleveland, Ohio, which said Order continued in full force and effect until the 11th day of April, 1921.

49 That said Interstate Commerce Commission on the 13th day of July, 1920, made and issued Service Order Number 9, providing that all common carriers by railroad within the territory embracing the said mines of the plaintiffs should in the transportation of coal give preference to public utilities, including street and interurban railways, electric power and lighting plants, gas plants, ice plants, water and sewer works, also hospitals, schools, and other public institutions, so that the same might be kept supplied with coal for current use.

That by further order made and issued by the Interstate Commerce Commission on the 20th day of July, 1920 and designated Service Order Number 10, it was further provided that in the transportation of coal by railroads, including the Chesapeake & Ohio Railroad, preference should be given to H. M. Griggs, Cleveland, Ohio, which said order likewise remained in full force and effect until the 11th day of April, 1921.

That said Interstate Commerce Commission on the 16th day of September, 1920, made and issued a further order designated Service Order Number 16, further providing that common carriers by railroads, including the Chesapeake & Ohio Railroad, within the territory embracing said mines of the plaintiffs, should give preference in the transportation of coal to said public utilities, street and interurban railroads and other companies hereinbefore mentioned.

50 That by reason of the said congestion of traffic and governmental interference through orders made and issued by the Interstate Commerce Commission, as aforesaid, the plaintiffs were disabled and prevented from shipping during the said three months 1000 tons in July and 1500 tons in each of the months of August and October, 1920.

That at all times during the period covered by said contract prior to the repudiation thereof by the defendant, plaintiffs

shipped to the lefendant, and the defendant received a larger proportion of coal than was shipped to other purchasers of coal contracted to be furnished by plaintiffs during said period from mines controlled by plaintiffs in proportion to the tonnage agreed to be shipped under the contract of plaintiffs with defendant aforesaid, and except as prevented by causes wholly beyond the power and control of plaintiffs, as above set forth, shipped to defendant each month of said period the tonnage agreed to be shipped by the terms of said contract.

Plaintiffs further aver that notwithstanding plaintiffs' inability to ship the full amount of coal specified under said contract from month to month, and notwithstanding the defendant's failure to receive the same, defendant continued from time to time thereafter to request further shipments, and in all respects recognized said contract as continuing in force, until defendant learned that because of sharp declines in the coal market and in the consumption of coals sim-
51 ilar to those purchased by the plaintiffs, it could obtain an adequate supply at prices greatly below the price agreed to be paid plaintiffs under said contract; and thereby said defendant waived its rights, if it ever had any such right, to discontinue or terminate said contract because of the inability or failure of plaintiffs to ship the full quantity of coal agreed to be shipped during each of said months.

Wherefore plaintiffs say defendant is not entitled to recover on its counter claim and they demand judgment accordingly.

CONNOR HALL
CLARENCE NICHOLS
SHIRLEY, WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

52 And afterwards to wit: at the May Term of said Court, on the 9th day of May, 1925, before the Honorable Robert C. Baltzell Judge of said Court, the following further proceedings were had herein to wit:

Comes now the defendant by its attorneys and files reply to plaintiffs' second paragraph of answer to defendant's counter claim, which reply is as follows:

53 * * (Caption) * *

DEFENDANT'S REPLY TO PLAINTIFFS' SECOND PARAGRAPH OF ANSWER TO DEFENDANT'S COUNTER CLAIMS.

For reply to Paragraph II of the plaintiffs' answer to the defendant's counter-claim the defendant denies each and every allegation therein contained.

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys for defendant.

Dated May 9th, 1925.

54 (Entry of May 9, 1925 continued)

And said defendant also files demurrer to paragraph two of plaintiffs' reply, which demurrer is as follows:

55 And afterwards to wit: at the May Term of said Court, on the 15th day of October, 1927, before the Honorable Robert C. Baltzell Judge of said Court, the following further proceedings were had herein to wit:

It is ordered by the Court that this cause be and the same is hereby redocketed.

Come now the plaintiffs by their attorneys and by leave of Court file amendment to complaint, which is as follows:

56 * * (Caption) * *

Plaintiffs by leave of court first had and obtained hereby amend the complaint herein by inserting the following words therein, to wit:

"Plaintiffs aver that if at any time coal was shipped by them to the defendant under said contract the same was different in kind or inferior in quality to that stipulated in the contract such differences were of slight degree and of no practical disadvantage to the defendant and that notwithstanding any such differences in kind or quality, which plaintiffs do not admit, defendant as above stated continued to receive all shipments as made with full knowledge of the kind,

quality and character thereof and accepted and paid for the same and made no attempt to terminate said contract on account thereof, but on the contrary from time to time requested and urged plaintiffs to continue such shipments under said contract and thereby recognized said contract as continuously in force and waived its right to terminate the same, if it ever had any such right, on account of any such difference in kind or quality between the coal actually shipped and accepted and that stipulated for in the contract," the above quoted words being hereby inserted immediately following the words "agreed to be shipped during each of said months" and immediately preceding the words "that the real motive and reason actuating defendant" as they appear in said original complaint on page 10 thereof.

CONNOR HALL
CLARENCE NICHOLS
SHIRLEY, WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

And afterwards to wit: at the November Term of said Court, on the 2nd day of February, 1928, before the Honorable Robert C. Baltzell Judge of said Court, the following further proceedings were had herein to wit:

Comes now the defendant by its attorneys and files answer, which answer is as follows:

* * (Caption) * *

ANSWER OF DEFENDANT.

Paragraph I.

The defendant, answering the complaint herein, for a first paragraph of answer, denies each and every allegation therein contained.

Paragraph II.

The defendant, answering the complaint herein, for a second paragraph of answer, alleges:

That plaintiff did not perform its said contract in this, to wit: that plaintiff in the month of September, 1921,

shipped to defendant 376 tons of egg coal and no more, and 1240 tons of mine run coal and no more, and in the month of October, 1921, shipped to defendant 41.21 tons of egg coal and no more, and 851 tons of mine run coal and no more, and in the month of November, 1921, shipped to plaintiff no egg coal whatever, but shipped 2,039.05 tons of mine run coal.

That the mine run coal so shipped to defendant was greatly inferior to egg coal, and defendant was at all times able to ship to plaintiff egg coal as required by said contract,
60 and was at all times able to ship to defendant the full quantity of egg coal agreed by plaintiff to be shipped to defendant, but plaintiff fraudulently and falsely represented to defendant that plaintiff was unable to furnish a greater quantity of coal, and fraudulently and falsely represented that plaintiff was unable to furnish defendant with any greater quantity of egg coal, which representations were untrue, as defendant well knew, and thereby induced defendant to accept and receive said shipments of mine run coal as a compliance with said contract under the provision thereof permitting plaintiff to ship mine run coal when unable to furnish egg coal, until it became apparent from the great quantity of mine run coal which plaintiff was shipping to defendant that said representations were untrue, and that plaintiff had been using its contract with defendant to enable it to dispose of its surplus production of inferior mine run coal and was diverting its production of egg coal to other more profitable markets, whereupon defendant directed plaintiff to cease shipping coal, as defendant had good right to do. That the defendant's acceptance of mine run coal instead of egg coal was caused and induced wholly by plaintiff's false and fraudulent representations aforesaid, and not otherwise, for which reason defendant denies that it waived such breach of contract on plaintiff's part, or recognized the said contract as in force after it had reason to believe that such breach had occurred, and that plaintiff's said representations were false.

Wherefore, defendant demands judgment.

Paragraph III.

The defendant, answering the complaint herein, for a third paragraph of answer, alleges:

61 That the contract set out in plaintiffs' complaint contains the following provision, to wit:

"It is expressly understood that the price or prices named

herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed."

That prior to the defendant's alleged breach of such contract in the complaint mentioned the rates of pay for mine labor at plaintiffs' mines were increased, and plaintiffs notified defendant of such increased and notified defendant that all coal shipped thereafter would be invoiced at a price in excess of that named in said contract, and that defendant refused to consent to such increase in price.

That by reason of the foregoing, the obligation of plaintiffs to ship and defendant to receive further coal under said contract was rendered indefinite as to price; that no readjustment of said price was ever agreed upon by plaintiffs and defendant; and that from the time of said increase in rates of pay for mine labor said contract became unenforceable and the mutual obligations thereunder of both parties ceased.

Wherefore, defendant demands judgment.

Paragraph IV.

The defendant, answering the complaint herein, for a fourth paragraph of answer, alleges:

That prior to and at the time of entering into the contract in plaintiffs' complaint set out, defendant was engaged in the business of the manufacture of glass at its plant at Indianapolis, Indiana; that plaintiffs' agents had, prior to entering into said contract, visited said plant, knew the
62 manner of operation thereof, and the facilities there available for the receipt and storage of coal; that the defendant, to the plaintiffs' knowledge, negotiated for said contract in order that the coal covered thereby might be used in the operation of such plant; and that the plaintiffs', thereupon, caused the contract to be executed upon a printed form prepared by them which contains the following provision:

"The buyer and seller in entering into this Contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party, and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery, speci-

fied above, insofar as the labor, the physical condition of the respective plants and the ability of the carriers will permit, and subject to the terms and conditions above set forth."

That during the months of July and August, 1920, plaintiffs failed to ship to defendant the 1500 tons of coal per month provided to be shipped by the contract in suit, but shipped to defendant a lesser quantity, not exceeding 900 tons per month, giving as excuses for such deficiency that there was a shortage of cars and that the lake quota from mines in the Kanawha district had been increased and plaintiffs
63 had been compelled to ship practically all paragon coal to the lakes; that plaintiffs shipped to defendant not exceeding 1600 tons of coal for the month of September, 1920, and again fell short in October, 1920, when plaintiffs shipped not exceeding 900 tons of coal; that by such course of undershipment, as well as by their letters, plaintiffs caused defendant reasonably to believe that defendant could not rely upon plaintiffs for the amount of coal which said contract provided to be shipped in any month; that defendant, in reasonable anticipation of the amount of coal that would be necessary for the operation of defendant's manufacturing plant, began toward the middle of September, 1920, to order and purchase coal elsewhere, such orders and purchases continuing through October and into November, 1920; that as a result defendant purchased from others than plaintiffs, for shipment to defendant during such period, 3505 tons of coal, which was no more than was reasonably anticipated to be necessary to supply the deficiency in plaintiffs' deliveries reasonably to be anticipated from the circumstances aforesaid; and that said coal so purchased was shipped to defendant during such period.

That contrary to defendant's reasonable anticipation aforesaid, and after defendant had contracted to purchase coal from others as aforesaid, and without plaintiffs' notifying defendant that the alleged conditions affecting plaintiffs' ability to ship coal had in any wise changed, the market price of coal having meanwhile unexpectedly declined, plaintiffs shipped to defendant during the month of November, 1920, a much larger quantity of coal than plaintiffs were entitled to ship and
64 deliver under said contract, to wit, 2039 tons, and in consequence thereof the available facilities for receiving and storing coal at defendant's aforesaid plant were filled and exhausted and such condition existed upon the fourth day of December, 1920, when defendant notified plaintiffs, as alleged in plaintiffs' complaint that it would not accept further coal unless expressly ordered.

That at such time the physical condition of defendant's said plant was such that it could not receive or store any further coal without great and prohibitive expense, and it was not possible profitably to operate said plant and use coal owing to causes wholly beyond the defendant's control; of all of which defendant advised plaintiffs, and on account of which defendant notified plaintiffs that it would not accept more coal until further orders, as in the complaint alleged.

That the aforesaid physical conditions preventing the receipt and delivery of coal at defendant's plant continued for a long time thereafter, to wit: until the 30th day of March, 1921, and plaintiffs never, after said 30th day of March, 1921, offered to ship coal to defendant under said contract, and defendant never thereafter refused to accept coal thereunder.

Wherefore, defendant demands judgment.

Paragraph V.

The defendant, answering the complaint herein, for a fifth paragraph of answer, alleges:

That prior to the time of entering into the contract in plaintiffs' complaint set out, defendant had certain con-
65 ferences and correspondence with the W. E. Deegans Coal Company of Huntington, West Virginia, regarding the advisability of entering into such contract; that said W. E. Deegans Coal Company of Huntington, West Virginia, is a corporation organized and existing under and pursuant to the laws of the State of West Virginia, and is the same W. E. Deegans Coal Company in the complaint mentioned; that in such conferences and by such correspondence the defendant stated and emphssized that it was negotiating with the said W. E. Deegans Coal Company on the assumption that said Coal Company was the owner of the mines furnishing the Paragon and Cub Fork coal eventually contracted for in said contract; that the defendant desired particularly to contract for its annual supply of coal with a party owning and operating mines capable of supplying the defendant's requirements, because such a relationship promised to guarantee surer delivery of coal; that the defendant did not desire to contract with any one not owning and operating the mines producing the coal to be delivered and so informed said W. E. Deegans Coal Company and its agents representing it in said negotiations; that the W. E. Deegans Coal Company

and its agents representing it in said negotiations thereupon represented to the defendant that it was the owner of the mines producing the Paragon and Cub Fork coal mentioned in said contract; and that relying upon said representation, the defendant thereupon was induced to and did execute the contract in the complaint mentioned.

That the representation as to the ownership of the mines producing said Paragon and Cub Fork coal, was a material representation upon which the defendant relied in entering upon said contract; and that the defendant would not
66 have executed said contract had it been informed of the fact (which fact actually was the case) that the W. E. Deegans Coal Company was not the owner of said mines but that said Company was acting throughout said negotiations and in the execution of said contract as the agent of the plaintiffs herein, its two undisclosed principals.

That the said W. E. Deegans Coal Company and its agents representing it in said negotiations, knew that it was not the owner of said mines producing the Paragon and Cub Fork coal in the contract mentioned.

That as a result of said misrepresentation, the plaintiffs herein are not entitled, as a matter of law, to avail themselves of the principle of undisclosed principal in bringing suit in their own names upon a contract executed by the W. E. Deegans Coal Company in its name, even though said W. E. Deegans Coal Company should, throughout said negotiations and at the time of the execution of said contract, have been acting for and on behalf of the plaintiffs herein, and even though said plaintiffs should have authorized the W. E. Deegans Coal Company to act for and on its behalf in the execution of said contract, and should, after execution, have ratified the same.

That as a result of said misrepresentation, the said W. E. Deegans Coal Company is not entitled, as a matter of law, to a cause of action upon said contract fraudulently induced, as hereinabove set forth, and that its assignee by instrument of assignment, as in the complaint set forth, is likewise not entitled to maintain a cause of action thereon.

Wherefore, defendant demands judgment.

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys for defendant.

67 And afterwards to wit: at the November Term of said Court, on the 7th day of March, 1928, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings were had herein to wit:

Come now the plaintiffs by their attorneys and file reply to defendant's answer, which reply is as follows:

68 • • (Caption) • •

The above named plaintiff's, for separate and several reply to each of the second, third, fourth, and fifth paragraphs of answer of the defendant herein, say that plaintiffs deny each and every allegation therein contained.

CONNOR HALL
CLARANCE NICHOLS
SHIRLEY WHITCOMB & DOWDEN
Attorneys for Plaintiffs.

69 And afterwards to wit: at the May Term of said Court, on the 28th day of May, 1930, before the Honorable Thomas W. Slick, Judge of said Court, the following further proceedings were had herein to wit:

Come now the parties by their respective attorneys and file stipulation as to use of depositions, which stipulation is as follows:

And the parties also file stipulation as to testimony of John Rau, President of Fairmount Glass Works, which stipulation is as follows:

And the parties also file stipulation as to supplemental answer of defendant and supplemental reply of plaintiffs, which stipulation is as follows:

And the defendant by leave of Court files supplemental answer which supplemental answer is as follows:

And the plaintiffs by leave of Court file supplemental reply, which supplemental reply is as follows:

This cause coming on now to be tried, here comes a jury, to wit: Uriah B. Cummings, William E. Ensminger, William

Goyert, E. O. Gregory, Charles Hobbs, Willard W. Ingram, Claude Katterman, Ord W. Kuhn, Ora T. Lower, Fred Mitchell, Robert Polk and Culver L. Proesang, who being duly impaneled and sworn, and having heard the evidence in part, are now allowed by the Court to separate until the calling of this cause tomorrow morning at 9:00 o'clock.

0. 70 And afterwards to wit: at the May Term of said Court, on the 29th day of May, 1930, before the Honorable Thomas W. Slick, Judge of said Court, the following further proceedings were had herein to wit:

Come now the parties by their respective attorneys, and the jury heretofore impaneled and sworn in said cause also comes and the trial of this cause is resumed, the evidence being concluded, and having heard the argument of counsel, the jury is instructed by the Court, and now return into Court the following verdict:

"We, the jury, find for the plaintiffs, and assess their damages at $1.00.

U. B. CUMMINGS,
Foreman".

1930. 71 And afterwards to wit: at the May Term of said Court, on the 15th day of October, 1930, before the Honorable Thomas W. Slick, Judge of said Court, the following further proceedings were had herein to wit:

Come now the parties by counsel and defendant's motion to amend by interlineation its counterclaim heretofore filed herein, to allege a market price of coal which it is alleged plaintiff failed to deliver to defendant, in the amount of as much as Eleven Dollars ($11.00) per ton, and to allege a total damage in the amount of Ten Thousand Dollars ($10,000), and to increase the prayer thereof in the amount of Ten Thousand Dollars ($10,000); is now sustained, to which plaintiff in open court objects and excepts, and said amendment is now made; to which plaintiff in open court excepts; and the court being sufficiently advised now overrules plaintiff's motion for a new trial, to which plaintiff at the time excepts.

It is therefore on motion of the defendant adjudged and

considered that the plaintiffs do recover against the defendant the just and full sum of One ($1.00) dollar together with their costs in this behalf expended taxed at ..... dollars. It is further ordered on motion of the plaintiffs that they be allowed ninety days fron the date of the entry of this order in which to prepare, tender and have signed and filed bills of exception.

87 And the plaintiffs also file Bill of Exceptions No. 1, which Bill of Exceptions has been signed and approved by the Court and is as follows:

88 * * (Caption) * *

PLAINTIFFS' BILL OF EXCEPTIONS NO. 1.

Filed Feb. 12, 1931.

Be It Remembered, That in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on the 28th day of May, 1930, at 9:30 o'clock in the forenoon, the following proceedings were had in the above entitled cause, before the Honorable Thomas W. Slick, Judge of the District Court of the United States:

The cause being at issue, came on for trial before the Court and a Jury.

Connor Hall, Esq. and Clarence W. Nichols, Esq. appeared as counsel for the plaintiffs.

Messrs. Smith, Remster, Hornbrook & Smith, James W. Noel, Esq. and Kurt F. Pantzer, Esq. appeared as counsel for the Defendant.

The jury having been duly examined and sworn to try the cause and opening statements by counsel having been made to the Jury.

89 The Plaintiffs, to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

I. F. VASS, a witness called on behalf of the plaintiffs, after being first duly sworn, testified that he now lives at Huntington, West Virginia, and has since May, 1917; he is sales man-

ager and president of the W. E. Deegans Coal Company, with which he has been connected since 1920. A contract was made between the Fairmount Glass Works and the W. E. Deegans Coal Company in May, 1919, to start July 1, 1919 and end July 1, 1920. On July 19, 1920, another contract was made with the Fairmount Glass Works, for 17,500 tons of Paragon or Cub Fork egg, or mine run, for shipment over twelve months up until July 1, 1921. The papers marked "Exhibits Nos. 1 to 8" were examined and found to be correspondence between the W. E. Deegans Coal Company and the Fairmount Glass Works. Such telegrams and letters were actually exchanged. "Exhibits 10, 10A and 10B" are, respectively, the contract between the Fairmount Glass Works and W. E. Deegans Coal Company, an endorsement by the Cub Fork Coal Company and Paragon Colliery Company, which was put on the contract at or about the time the contract was made, Mr. Rau, however, not being present. The second endorsement "10-B" was placed on the contract June 10, 1924. This paper is the original contract. There was a written contract between the Cub Fork Coal Company and Paragon Colliery Company on the one hand, and the W. E. Deegans Coal Company on the other.

The majority stockholders of the Cub Fork Coal Company and Paragon Colliery Company and the W. E. Deegans Coal Company on July 19, 1920, were W. E. Deegans, Jack Faulkner, O. C. Hoffman, and John B. Hoffmeyer, who were the majority stockholders in the three companies at the time the contract was executed.

90 The plaintiffs offered as evidence the contract referred to as "EXHIBIT NO. 10", together with the endorsement "EXHIBIT 10-A" and "EXHIBIT NO. 10-B" to the introduction of which the defendant excepts for the reason that the contract on its face purports to be a contract with the W. E. Deegans Coal Company and there had been no proof that the plaintiffs were undisclosed principals; and to the admission of "Exhibit No. 10-A" for the reason that it was made without the presence and without the knowledge of the defendant; and to the assignment 10-B for the reason that the contract itself had not yet been proved.

The court admitted in evidence the contract and assignments marked "EXHIBIT NO. 10", "EXHIBIT NO. 10-A" and "EXHIBIT NO. 10-B" respectively, to which the defendant excepts. Copies of the Exhibits Nos. 10, 10-A, and 10-B are set out in the complaint filed herein by the plaintiffs, to which reference is made for a statement of the contents thereof.

The witness further testified that "Exhibit No. 10" was executed in the office of the W. E. Deegans Coal Company at Huntington, no one being present, as the witness recalls, except himself and Mr. Rau, President of the Fairmount Glass Works.

The W. E. Deegans Coal Company merely acted as the sales organization, a sales corporation for handling the sale of the coal from the Cub Fork, Paragon Colliery, and various other mines in which the same persons were interested.

Mr. Rau signed the contract as president of the Fairmount Glass Works, coming to Huntington for that purpose. He was in the offices of the W. E. Deegans Coal Company for possibly an hour and a half or two hours. The witness was not with him all the time. The witness took him up and intro-
91 duced him to W. E. Deegans in his office, which was on the floor above. There was very little conversation about the contract as it was practically closed before Mr. Rau came to Huntington.

The papers marked "Exhibits Nos. 11 to 25-2" are telegrams and letters exchanged between the W. E. Deegans Coal Company and the Fairmount Glass Works, and were actually exchanged between the parties.

The W. E. Deegans Coal Company reported all shipments made on the contract "Exhibit No. 10", invoiced all the coal for the Fairmount Glass Works, and received payment from the latter. The correspondence was likewise conducted by the W. E. Deegans Coal Company.

The W. E. Deegans Coal Company also looked after the traffic, handling of the shipments and the correspondence.

The witness, after the execution of the contract, next saw Mr. Rau in Indianapolis in December, 1920 in his office, where the witness had a conversation with him relative to the contract sued upon. Mr. Rau had called on the W. E. Deegans Coal Company to suspend shipments and the witness went
92 there for the purpose of trying to get him to authorize resumption of shipments.

Mr. Rau stated that they had a good supply of coal on hand at that time, that they had curtailed production at the plant, and that they could not take any more coal at that time, but later on "When they needed coal he would get in touch with us, and if we would reduce the price he would take additional coal. He would not and did not agree to take any more coal at any time unless there was a modification in the price."

In the month of December, 1920, and the first six months

of 1921 the Cub Fork Coal Company and Paragon Colliery Company were ready and able to ship 1500 tons of Paragon egg or Cub Fork Egg to the Fairmount Glass Works.

To this last statement the defendant objected, but the objection was overruled and the defendant excepted, for the reason that no contract has been established, and the question called for a conclusion.

The witness has been in the coal business since June, 1917, and perhaps 1918, and as general manager of Sales of the W. E. Deegans Coal Company, and in a general way became familiar with the supply of cars allotted to the Cub Fork Coal Company and Paragon mines.

During part of the time the Interstate Commerce Commission regulations and the regulations of the Government interfered with the distribution of the coal. That is, they directed the coal to be shipped in certain directions, to certain destinations and certain regulations of the Government, as I understand it, were governing the car supply at all times—that they might be equitably distributed and an equitable allotment made according to the capacity of the mines.

93 The witness did not keep any general records of car supply in the office, but the records of the Chesapeake & Ohio Railway Company were available to them. He did not examine the Chesapeake & Ohio records but knows the approximate car supply during the period in question, prior thereto, and afterwards.

In December, 1920, and the first six months of 1921 the Paragon Colliery Company and Cub Fork Coal Company had a fair supply of cars. In December 1920 and the first six months of 1921 the Cub Fork Coal Company and Paragon Colliery Company had egg coal in excess of their contract requirements amounting to approximately 20,000 tons a month, or over, for the spot market, loading to full capacity all the time.

To this last statement the defendant objected, but the objection was overruled and the defendant excepted.

The price of Paragon and Cub Fork egg, during that period of time, was about $5.75, in the month of December, 1920; $4.15 in the month of January, 1921; $3.50 in the month of February, 1921; $3.00 in the month of March, 1921; and $2.75 during the months of April, May and June, 1921. The price of mine run, during the same period of time, I should say was approximately twenty-five cents per ton less.

The defendant objects and moves to strike out the testimony as to differences, for the reason that the contract

has not been proven, but the court overruled the objection, and denied the motion, to which the defendant objects.

94 The witness has before testified in suits between the W. E. Deegans Coal Company and Fairmount Glass Works in this court, this being the fifth time the witness has testified.

"Exhibit No. 26" is a complaint on the part of the W. E. Deegans Coal Company against the Fairmount Glass Works, suing for breach of contract, which was tried in May 1923, in the Federal District Court and dismissed by the plaintiff, W. E. Deegans Coal Company; and "Exhibit No. 27" is a similar complaint which was tried in May 1924, in the Federal Court and dismissed by the plaintiff, W. E. Deegans Coal Company. Both complaints are introduced in evidence as plaintiff's exhibits; and the witness testified he had been a witness in the trial of both complaints. The present case has been twice tried, the witness testifying in each case, and each time there was a verdict for the defendant, and each time the judgment was reversed by the Circuit Court of Appeals.

Cross-Examination.

Contract "Exhibit No. 10" was executed in duplicate. Mr. Rau took a copy. On his copy neither the endorsement "10-A" nor the assignment "10-B" appeared. The assignment was executed after the dismissal of the second complaint filed by the W. E. Deegans Coal Company. The acceptance was written on there on or about the time the contract was made, almost simultaneously. The witness did not say that Mr. Rau refused to take the coal, but did say his wording was, he would not take any more coal unless the price was modified.

The witness has testified four times before. At the trial on May 12, 1924, Vass testified that Mr. Rau "did not repudiate the contract" during the conversation Vass had with Mr. Rau in Indianapolis, and Vass admitted that he had made this statement at both previous trials of this cause.

W. R. HODGES, a witness called on behalf of the plaintiffs after being first duly sworn, testified as follows:

Direct Examination.

The witness lives at Huntington, West Virginia, where for sixteen years he has been statistician for the Chesapeake & Ohio Railway Company, having supervision of coal cars for West Virginia and Kentucky, including the territory of the Cub Fork and Paragon Colliery Company mines. The
95 mines of these two companies are supplied by the Chesapeake & Ohio Railway Company, and are not reached by any other railroad. The witness has the records of supply of coal cars supplied to the Cub Fork Coal Company and Paragon Colliery Company during the period of December, 1920 and the first six months of 1921. The records were made from telephone reports from the mines themselves, coming through a distributor at Peack Creek, who makes a telephone report to the witness's office on a form. These forms are sent through the office but are destroyed each year. The sheets I now have were transcribed from the telephone reports. These are the original transcriptions from the telephone reports and are made into a permanent record. "Exhibit No. 28" is a copy of the car records covering the period mentioned, made from the Chesapeake & Ohio Railway Company records, read into the evidence.

The defendant does not object to the form of the evidence, but to its materiality, for the reason that the contract has not been proven. The objection is overruled, and the defendant excepts.

Car allotment means the ability of the mines to load coal when working continuously, as expressed in terms of fifty ton car equivalent. Car supply is the number of cars charged to the mines, based on their order, which in turn, is based on their allotment. The mine can order less than its allotment but not more. During a period of short car supply, the railroad apportions the cars to the various mines on a percentage basis. During the last six months of 1920, there was a shortage of cars on the Chesapeake & Ohio Railway, but during the first six months of 1921, we had a full car supply, one hundred per cent, but in December, 1920, the car supply was short,
96 but by the end of the month it was full. For the last six months of the year 1920, the percentage of supply was 53.6 for the Chesapeake & Ohio field.

Cross-Examination.

In the first column of "Exhibit No. 28" under Paragon No. 1, "Or'd" means cars ordered. That number did not exceed the allotment. The second column shows the actual number of cars supplied. The third column shows the actual cars loaded at the mines. The right hand column is the percentage of the cars supplied to the number ordered. The same is true of Paragon No. 2 and Cub Fork. The third column represents the number of cars loaded, fifty ton cars. A seventy ton car would be called 1.4. Most of the cars on the C. & O. are seventy and ninety ton cars. This record does not take into consideration cars controlled by the Government.

J. F. GRIMET, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows (the witness being permitted to read from his testimony in the last trial, but a great number of exceptions being taken in the course of such readings, as quoted in this Bill of Exceptions):

Direct Examination.

The witness lives at Huntington, West Virginia, and in 1920 was Secretary and Treasurer of the Paragon Colliery Company and Cub Fork Coal Company, whose duties were to pay the obligations of the companies and supervise the records and statements. In such work the witness has had ten or twelve years experience. For the year 1920 and 1921 the Cub Fork Coal Company and Paragon Colliery Company kept shipping forms and cost sheet forms showing the amount of coal produced from their mines. This record was made up part at the mines and afterward completed at the Huntington office under the direct supervision of the witness. The
97 witness produced records of original entry showing the production during the month of December, 1920 and the first six months of 1921.

To which the defendant objects, for the reason that the evidence is in no way material, and that the plaintiffs have not shown any connection with the contract, which objection is overruled, and the defendant excepts.

The witness does not know whether there were any contracts between the plaintiffs and the W. E. Deegans Coal Company in the years 1920 and 1921, and Mr. Hall, counsel

for plaintiffs, made the statement: "We will show there was no written contract of agency."

The defendant further objects to the testimony of the witness as being hearsay. The objection is overruled and the defendant excepts.

In 1920 the W. E. Deegans Coal Company acted as the selling agency for the Cub Fork Coal Company and Paragon Colliery Company, and sold and handled all the coal produced by those two companies.

The defendant objects to the last statement as calling for a conclusion, and as being hearsay as to the relation between these companies. The court overrules the objection and the defendant excepts.

The three companies mentiond were owned by practically the same people: W. E. Deegans, his associates I. F. Vass, A. W. Fitzwater, J. F. Grimet, O. C. Hoffman, John Faulkner, and others constituted the majority stockholders in the Cub Fork Coal Company and Paragon Colliery Company. The witness reads from a record the following statement of coal produced by the mines:

Paragon Colliery Company, mine No. 1, December, 1920, 5278 tons; No. 2, 2608 tons; January, 1921, No. 1, 2160 tons, No. 2, 1307 tons; February, 1921, Paragon No. 1, 4425, No. 2, 1000 tons; March, 1921, Paragon No. 1, 6558 tons, No. 2 2088 tons; April, 1921, Paragon No. 1, 3816 tons, No. 2, 1405 tons; May, 1921, No. 1, 12046 tons, No. 2, 7949 tons; June, 1921, Paragon No. 1, 14251 tons, No. 2, 7240 tons.

98 December, 1920, Cub Fork, 2336 tons; January, 1921, 1348 tons; February, 1921, 951 tons; March, 1921, 2053 tons; April, 1921, 1632 tons; May, 1921, 5128 tons; June, 1921, 4851 tons.

In 1920 and 1921 the Cub Fork Coal Company and Paragon Colliery Company kept a record of the costs of producing coal at the mines, which was made under the supervision of the witness. The witness produces a record of original entry showing the costs of producing coal in the mines in December 1920, and the first six months of 1921. The witness has cost sheets tabulated separately for the total production of the mines less the 1500 tons on the contract, and for the 1500 tons on the contract.

The defendant objects to the testimony as to the cost production of the coal for the reason that there is not set up in the complaint and for the reason that there is no measure of damages claimed, and that it is imma-

terial. The court overrules the objection and the defendant excepts.

The defendant further objects to the record for the reason that it is not shown to be properly authenticated.

The data for the cost sheets is obtained from the mines in cost sheet form, specifying the items of pick mining, macine cutting, machine loading, drivers of motor runners, trappers, track men, slate men, timbering, ventilation, drainage, mine timbers, mine foreman, assistant mine foreman, mining engineer, electricians, bonding and wiring, track repairs, track road repairs, drum house crews, tipplemen, top and bottom mine superintendent, teamsters, stable boss, car repair men, power-house crew, blacksmith, outside foreman. This information is compiled in cost sheet form and entered on the general books of the company. The witness has with him the books or original entry and the costs. The slips from which the information is taken were made up on forms by the men at the mines, and are mailed in once
99 each month, to the office, and the office puts on the overhead, supplies and distribution, which is obtained from the office records of the company.

The witness reads from the record the following cost items:

Cub Fork Mine, December, 1920, 3.617; January, 1921, 3.789; February, 1921, 3.586; March, 1921, 2.71; April, 1921, 2.649; May, 1921, 1.788; June, 1921, 1.858;

Paragon Colliery Company, Mine No. 1, December, 1920, 3.371; January, 1921, 4.402; February, 1921, 2.124; March, 1921, 2.109; April, 2.186; May, 1.382; June, 1.637;

Paragon Colliery Company, Mine No. 2, December, 1920, 2.613; January, 1921, 3.563; February, 3.38; March, 2.894; April, 2.316; May, 1.458; June, 1.672.

The defendant renewed the objections to the testimony given above, but the objection is overruled and the defendant excepts.

Cross-Examination.

The inside and outside costs were made up from sheets mailed from the mines. The witness did not go to the mines and take the costs, did not observe or keep the time of the men, and check up on the supplies that were being use, but relied entirely upon reports that came in. In addition to the report as stated, a regular payroll report also

comes. The witness has no first hand knowledge of the facts contained in the report except such as could be gathered from visits to the mines three or four times a year. The witness has verified and checked up the report on several occasions, but does not recall whether he checked the ones now produced.

The defendant moves to strike out the testimony of the witness as to costs. The court overruled the objection and the defendant excepted.

100 The checks for the payroll were set to the bank and the money was sent by the bank by express to the mine office, payment for all of which went through the witness' office. The monthly report mentioned was made up from payrolls and daily sheets of expenses made out at the mines, which were not made out by the witness.

The defendant renewed its motion, but it was denied, and the defendant excepted.

The contracts for the sale of coal are handled through the W. E. Deegans Coal Company, and are not part of the witness' duties, and he did not know anything about it. The W. E. Deegans Coal Company is a separate corporation, of which the witness is not a stockholder. There are a number of stockholders, probably twenty-five. I. F. Vass is a stockholder in the W. E. Deegans Coal Company. W. E. Deegans and the witness are both stockholders in the Paragon Colliery Company. W. E. Deegans was a stockholder in the Paragon Colliery Company in 1920 and 1921, and the witness can not say certainly whether he was a stockholder in the W. E. Deegans Coal Company. Mr. Vass was a stockholder in 1920 and 1921 in the W. E. Deegans Coal Company. W. E. Deegans owned in excess of fifty per cent of stock in the Paragon Colliery Company and Cub Fork Coal Company. The witness was a stockholder in the two last mentioned companies, but Mr. Vass was not. The witness has nothing to do with the records of the W. E. Deegans Coal Company and there is no way in which he can refresh his memory as to who were its stockholders, and he does not know now who were its officers in 1920 and the early part of 1921.

101 Q. You may state whether or not they are the owners of the mines from which the coal was produced?

A. They are.

Q. And were they in 1920 and 1921?

A. Yes, sir.

Q. Beginning with December 1, 1920, and through to July 1, 1921, was there any change in the rates of pay for any labor at those mines?

A. There was not.

Cross-Examination.

That he did not think that there had been any change in the rate of pay, prior to September 1st, 1920; that he did not know of any change in the rate of labor pay effective in either August or September of that year, and if there had been such a change in the rate of labor or the payment of labor at those mines during the month of August or September, he would have known of it; that the cost per ton, during the months of December, 1920, down to and including June, 1921, included selling expense; that the selling expense was six per cent (6%); that mining, cutting, loading, yardage, drivers, motor runners, brakemen, trappers, trackmen, slate crew, timbering, ventilation, drainage, electricians, tipple men, teamsters, stable bosses, car repairmen, blacksmith, outside foremen, mine supplies, power, stable expense and royalties was included in the cost per ton; ten cents (10c) per gross ton was the percentage of royalties and approximately four cents (4c) per ton, consisted of overhead; and that the royalties were paid to the owners of the real estate, the Dinguss Run Coal Company, which owned the real estate in which the mines were situated which the Plaintiffs were operating, and leased the real estate to them.

102 At this point the witness Grimet completed reading his testimony at the last trial, and plaintiff concluded direct examination by developing the following additional testimony:

There was a change in the rate of pay prior to September 1, 1920, taking effect as of September 1st. There was no increase after September 1st. The witness does not recall what the rate of increase was nor the period it covered.

Cross-Examination.

There was no change effected in the rate of labor pay in August or July. The witness does not recall now whether there was any change after July 1, 1920, if there had been

such he probably would have known it at the time, but would not now as it has been ten years.

Stipulation.

It is stipulated by and between the parties hereto that the depositions of Walter H. Tetman; M. Lee Burtless and Milton M. Tyree heretofore taken in the case of W. E. Deegans Coal Company vs. Fairmount Glass Works may be read in this case, and subject to the same, but no other objections than as taken here.

The deposition of WALTER L. TETMAN, a witness called on behalf of the plaintiffs, was read in evidence, in which he testified that he lived at Huntington, West Virginia; that his occupation was Field Agent for the Chesapeake and Virginia Coal Company, whose business was buying, selling and trafficing coal. That his company handled a coal similar to the Paragon and Cub Fork egg coal, known as the Chilton coal from the Sovereign Coal Company located in Logan County, West Virginia. That his duties with the Chesapeake and Virginia Coal Company, was buying, selling and trafficing coal; that he had been so engaged
103 since June 16, 1919; that he knew the market price of Paragon and Cub Fork egg coal, in the months of December, 1920, and January, February, March, April, May and June, 1921; that the average price on Chilton egg coal a similar coal in December, 1920 would be about $5.50 to $5.75; that in January 1921 the average price was about $4.00 February about $3.65, in March about $3.50, in April about $2.60 to $2.70, in May $2.60 to $2.70, and in June $2.80 to $2.90.

Cross-Examination.

That he did not testify from his recollection of prices, but testified from figures procured from his own records of sales actually made during that time; that he had the figures with him and had a carbon copy of the data which he compiled from his own sales record. That the kind of coal that he had in his records of sales made from which he was testifying was egg coal from the Chilton seam.

Redirect Examination.

That the similarity of the Chilton Seam to the Paragon and Cub Fork egg coal was approximately the same in preparation, both prepared over tipple with shaker screen. The grade was the same and the quality of the coal very similar. That he would file as part of his deposition the statement
104 which he had produced, which was marked for identification as "Plaintiffs' Exhibit, Statement, Walter L. Tetman."

Recross Examination.

That mine run and egg coal is an entirely different grade; that the difference in price would be anywhere from Twenty-five cents a ton to Seventy-five cents a ton less.

M. LEE BURTLESS:

Deposition of M. Lee Burtless was read, in which he testified that he lived at 2430 Ninth Avenue, Huntington, West Virginia; had no intention of being in Indianapolis at the time of the trial; that he was coal sales manager for the Logan Elkhorn Coal Corporation; that he had been connected with the coal sales business since 1918; that he was familiar with the market price of Paragon and Cub Fork egg coal in the months of December, 1920 and January, February, March, April, May and June, 1921, and could tell approximately the market price during that period. That the market price for that grade of coal in December 1920 was $5.70 on an average, in January, 1921, about $4.20, February about $3.15, March $2.80, April 1921, $2.75, May 1921, $2.75 and June about $2.60.

Cross-Examination.

That prior to that time, say in 1920 about September, it was worth much more than that, about $11.00 a ton; that in May 1920 when the market went up, he knew of some men selling coal for $20.00 a ton; that he thought the prevailing price for June, 1920 was about $6.00 or $7.00 a ton and in July went up to $8.00 or $9.00 a ton and in August $10.00 or

$11.00 a ton, in September it went to $11.00 a ton. That during that period of time there was a difference between mine run and what is called egg coal of from Fifty Cents to one dollar a ton less for mine run. Prior to this, mine run
105 sold for more than egg would sell for.

MILTON M. TYREE:

Depositions of Milton M. Tyree, a witness called on behalf of the plaintiffs was read in evidence, in which he testified that he lived at Huntington, West Virginia, did not expect to be in Indianapolis at the trial; that he was Western sales manager of the West Virginia Coal Company and his business included the buying and selling of coal; That he had been actively engaged in that buisness for fifteen years; that he made a special effort to be familiar with the market daily. That he was acquainted with the coal known as the Paragon and Cub Fork egg in December 1920, January, February, March, April, May and June, 1921; that a fair price would be $5.50 to $5.75 in December 1920 and in January 1921 was around $3.50 for that grade of coal, February about twenty-five cents under that, March the market price was fluctuating all the way from $2.25 to $3.25; that he would think about $2.75 to $3.00, in April 1921 about $2.65 to $2.80, in May about the same, in June the same. All of these prices were f.o.b. at the mine. That in the fore part of 1921 it was often hard to get orders, especially in bulk or large quantities,—that is in blocks of one hundred or two hundred or three hundred cars, it was hard to sell in large blocks at any price.

Plaintiffs' exhibit statement of Walter L. Tetman was introduced and read in evidence and is in the words and figures following, to-wit:

106 "PLAINTIFF'S EXHIBIT STATEMENT
WALTER L. TETMAN.

Austin M. Sikes,
Notary Public.

						Average price during month per net ton
Dec.	3 1920	1 car egg	7.25	net ton	mines	
	3	2	7.25			
	10	1	5.40			
	21	3	5.00			
	30	1	4.50			
	30	1	4.75			
	31	1	4.75			5.615
Jan.	6 1921	5	4.00			
	7	1	4.00			
	7	1	4.50			
	10	1	4.00			
	18	2	3.75			
	17	1	3.75			3.977
Feb.	9 1921	1	3.75			
	21	1	3.50			
	23	1	3.50			3.583
March	3 1921	1	3.50			3.50
April	1, 1921	1	2.75			
	11	1	2.90			
	20	1	2.90			
	28	1	2.50			
	28	1	3.00			
	29	1	2.50			
	29	1	2.50			
	29	1	2.50			
	29	1	2.50			
	29	5	2.65			

107

						Average price during month per net ton
April	29, 1921	1	car egg	2.50	net ton miles	2,653
May	2, 1921	10		2.70		
	2	1		2.75		
	4	1		2.65		
	17	2		2.75		
	18	1		2.65		
	18	1		2.65		
	18	1		2.65		
	19	1		2.65		
	19	1		2.65		
	13	1		2.75		
	20	1		2.65		
	21	5		2.65		
	23	1		2.60		
	27	20		2.70		
	27	1		2.70		2.666
June	1, 1921	1		2.75		
	3	1		2.90		
	6	1		2.75		
	1	10		2.90		
	16	1		2.90		
	22	11		2.90		2.880

108 W. E. DEEGANS a witness on behalf of the plaintiffs, after being first duly sworn, testified:

Direct Examination.

That he lived in Huntington, West Virginia and had since 1914. In July 1920 the witness was President of the W. E. Deegans Coal Company and General Manager of the Cub Fork Coal Company and Paragon Colliery Company. He, his wife, and Mr. Hofmeier owned a controlling interest in the W. E. Deegans Coal Company, Cub Fork Coal Company, and Paragon Colliery Company. Mr. Hoffmeier was a partner of the witness. "Exhibit 10-A was actually signed by the Cub Fork Coal Company and Paragon Colliery Company by myself as president. This endorsement was put on the contract the same day the contract itself was signed or a day or two afterward."

The shipments made by the Cub Fork Coal Company and Paragon Colliery Company went through the W. E. Deegans Coal Company.

To this last statement the defendants objected, but the court overruled the objection, and the defendants excepted.

All the dealings of the Cub Fork Coal Company and Paragon Colliery Company were through the W. E. Deegans Coal Company. The last named company also handled all the correspondence and billing.

Cross-Examination.

All the invoices for the coal in question were made by the W. E. Deegans Coal Company and the Cub Fork Coal Company and Paragon Colliery Company did not appear on them. The witness can not say as to whether any of the correspondence with the Fairmount Glass Works contained on the letter heads the names of the Cub Fork Coal Company and Paragon Colliery Company, but does know that there
109 was stationery of the W. E. Deegans Coal Company on which the various mines, including the Cub Fork Coal Company and Paragon Colliery Company were listed on the left and right. The witness has not testified at any of the previous trials.

The defendant then introduced in evidence "EXHIBIT B" in the words and figures following, to-wit:

"W. E. Deegans Coal Company
Bituminous Coal

Pocahontas — New River

By Products
Paragon Steam
Cub Fork Lump & Egg
Island Creek
Eagle

Sterling Lump — Royal Block
General Offices — Huntington, W. Va.
Dec. 30th, 1920

Fairmont Glass Works,
Indianapolis, Ind.

Gentlemen:

"All sales and quotations subject to conditions printed on back of this sheet.

"Will you please advise whether or not you are going to be in position to take in any egg coal during the month of January? Our Paragon mines have been closed down since December 22nd. but will probably resume operations about the first of the month and we would like to know if you are going to be in shape to take in any coal and, if so, we will see if we can get together on some kind of an adjustment of this contract.

Yours very truly,
W. E. DEEGANS COAL COMPANY
IFV:L By I. F. VASS

Annual Capacity 2,000,000 Tons

110 EXHIBIT B.
(on back)

"Conditions for the Sale and Delivery of Coal.

"1. Terms of payment, cash on or before the 10th of each month for all coal shipped during the preceding month. Bills subject to sight draft if not paid when due. Terms of payment being essence of this contract, non-compliance therewith shall give sellers privilege of cancellation, and waiver in any case shall not be construed as destroying this right, and also, the right to cancel this contract is especially reserved in the event the seller has reason to believe that the credit of the buyer is impaired. We reserve the right to require payment in advance of shipment.

"2. The deliveries under this contract are subject to car supply, strikes, labor agitations or disturbances and causes otherwise beyond our control; that in addition to this contract, the seller has executed and may from time to time further execute such additional contracts as will furnish it with a market for its entire estimated product, and that in the event the seller shall at any time, for any cause, be unable to deliver to its customers the entire tonnage called for by all of its contracts with them then in force, the total tonnage of the seller then available shall be applied on all of said contracts, in proportion to the amounts severally called for by them, and the amount deliverable under this and all of said contracts shall be reduced accordingly, and there shall be no liability on the part of the seller for the reduction so made. In case of strikes or accidents unavoidably causing stoppage or

partial stoppage of the works of the purchaser, delivery herein contracted may, upon request of purchaser be suspended or partially suspended during such stoppage.

111 "3. In case of failure by the purchaser to order or accept this coal as agreed, the sellers may, during the term of this contract reduce the said tonnage the quantity the purchaser failed to order or accept, and also reduce the tonnage a like amount during any other equal period of this contract, provided such failure of the purchaser is not excused by the above condition, as set out in Paragraph No. 2.

"4. Actual railroad weights as ascertained by initial lines are to govern settlements.

"5. The contract price is based on the present total cost of producing coal at the mines (the estimate of the cost of coal by the seller to be unquestioned by the buyer) and the railroad freight rate from the mines to the point of f. o. b. delivery, but if either or both of these rates or costs be changed during the term of this contract, then the price shall be changed accordingly on the tonnage which may be delivered under this contract, during the period the changed rate or rates, or costs, are in effect—i. e., should there be any increase in the foregoing rate or rates, or costs, during the term of this contract, purchaser is to pay for same; should there be any decrease, purchaser is to have benefit of same.

"6. All quotations, sales, contracts, and orders are subject to approval and acceptance by the home office of the company at Huntington, W. Va. and no sales or contracts shall be binding upon the company unless so accepted and approved, and the right is reserved to require payment in advance of shipment."

(End of Exhibit B.)

112 "Exhibit C" does not have the name of the Paragon Colliery Company or Cub Fork Coal Company on it and is different from "Exhibit B". The witness can not say whether the names of the Cub Fork Coal Company or Paragon Colliery Company appear on any of the correspondence with the Fairmount Glass Works. The witness stayed at the mines. There was a time when the witness was not president of the W. E. Deegans Coal Company. At the time the contract was signed Mr. Vass was president. The witness had a talk with Mr. Rau about the contract. He was in the witness' office. The endorsement "Exhibit 10-B" was not on Mr. Rau's copy of the contract. So far as the witness knows Mr.

Rau was not present when it was written. In 1920 the witness owned about 58% of the stock of the Cub Fork Coal Company and about 75% of the Paragon Colliery Company and about 55% of the W. E. Deegans Coal Company. The receipts from the coal came through the W. E. Deegans Coal Company, that is to say the checks came to it. The W. E. Deegans Coal Company settled with the mines once a month, and gave it checks, less its commission. The witness does not recall any checks that came to the Cub Fork Coal Company and Paragon Colliery Company direct from the Fairmount Glass Works.

It is stipulated between the parties that the Cub Fork Coal Company and Paragon Colliery Company were, at the time of the institution of this suit and now are, citizens organized and existing under the laws of the State of West Virginia, and that the defendant Fairmount Glass Works is a corporation, created, organized, and existing under the laws of the State of Indiana, and its residence and principal office is in Indianapolis in the said state, and that the amount involved herein is in excess of Three Thousand Dollars, exclusive of interests and costs.

113 A. W. FITZWATER, a witness on behalf of the plaintiffs after being first duly sworn, testified that he was Secretary and Treasurer of the W. E. Deegans Coal Company, charged with the custody of the corporation's papers, contracts, books, and records. The witness produced two papers, one being an agreement dated the first day of July, 1927 between the W. E. Deegans Coal Company and another dated July 2, 1917, between the Cub Fork Coal Company and W. E. Deegans Coal Company, and are numbered respectively "EXHIBIT NO. 29" and "EXHIBIT NO. 30." These contracts are signed by W. E. Deegans, President, and C. L. Van Zandt vice-president. I am acquainted with the signatures of both officers and these are genuine. These contracts were delivered to the W. E. Deegans Coal Company and were in force and effect in 1920, and 1921, which exhibits are introduced in evidence.

Cross-Examination.

Settlements by the W. E. Deegans Coal Company and the other two companies were made monthly around the 15th,

20th, or 25th for the entire month's tonnage, less a commission to the W. E. Deegans Coal Company of 8%. The contracts were not terminated by any notice. If they were long term contracts the W. E. Deegans Coal Company would consult the mining companies. The W. E. Deegans Coal Company determined the matter of credit. It likewise did all the billing, invoicing, and received all checks and carried on all correspondence. There were no direct dealings between the Fairmount Glass Works and Cub Fork Coal Company and Paragon Colliery Company. Thereupon the plaintiffs introduced in evidence EXHIBITS 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25-2", and EXHIBIT NO. 31.

A. W. FITZWATER, recalled on behalf of the plaintiffs testified that the following amounts of coal were shipped under contract "Exhibit 10-A":

114 In July the tonnage shipped was 677.85 tons; there was paid for by the Fairmount Glass Works, 632.5 tons; there were confiscated by the Railroad Company, 45.35 tons. That was in July.

For the month of August there was shipped 1242.95 tons; there was paid for by the Fairmount Glass Works 1052 tons; confiscated by the railroad 190.95 tons.

For the month of September there was shipped 1616.15 tons, all paid for by the Fairmount Glass Works, no confiscations.

In October there was 1062.5 tons shipped; 900.20 tons were paid for by Fairmount Glass Works and 162.3 tons confiscated.

In November there were 2039.5 tons shipped, all paid for by the Fairmount Glass Works.

In December there was 93.2 tons shipped and paid for by the Fairmount Glass Works; no confiscations in the last two months.

Cross-Examination.

All these shipments were made by the instructions of the W. E. Deegans Coal Company, and they likewise did the billing and sent the invoices, and received the pay therefor. The W. E. Deegans Coal Company collected from the railroad for the confiscations. The Fairmount Glass Works paid for all the coal received. The witness has with him a statement of this tonnage which is filed as "Exhibit No. 32" on behalf of the plaintiffs.

J. F. VASS, recalled for further cross-examination testified: The monthly capacity of the Paragon and Cub Fork mines in 1920 and 1921 was approximately 30,000 tons, of which there was contracted in excess of five to eight thousand tons a month. This included the contract with the Fairmount Glass Works.

115 And the foregoing was all the evidence introduced in chief by the plaintiffs, and the plaintiffs here rested.

Whereupon, the defendant to maintain the issues on its behalf, offered and introduced the following evidence, to wit:

CLAYTON B. JOHNSON, a witness on behalf of the defendant, being first duly sworn, testified that he resided in Indianapolis, Indiana, and since 1904 has been connected with the defendant as bookkeeper, cashier, pay master, and at present as secretary. As secretary he has custody of the records, papers, and correspondence. John Rau, former president of the Fairmount Glass Works died September, 1928, subsequent to the last trial of this case and prior to the present trial. The defendant has recently changed its name to Fairmount Glass Works, Incorporated, under the provisions of the Indiana General Corporation Act. Mr. Rau conducted the correspondence with the W. E. Deegans Coal Company in reference to the contract in question.

The witness prepared the checks by which payments were made to the W. E. Deegans Coal Company. There is produced defendant's "Exhibit D" consisting of twenty-nine checks, all of which were prepared by the witness and were payments upon the contract in question, all of which were introduced in evidence marked "D-1" to "D-29" both exclusive. "Exhibit D-1" together with its endorsement is in the words and figures following:

116 **EXHIBIT D-1.**

"FAIRMOUNT GLASS WORKS
Manufacturers of Bottles

No. 13765

Indianapolis, Ind., 1-21-1921

Pay to W. E. Deegans Coal Co., or order $1726.25

100

Seventeen Hundred Twenty Six Dollars Twenty Five Cents.
To The Fletcher American National Bank,
Indianapolis, Ind.

FAIRMOUNT GLASS WORKS,
By J RAU *Prest.*
Treas.

(Perforated Stamp): "Paid
2-4-21
20-1

(Endorsements:)
"Pay to the Order of
American Bank & Trust Co.,
Huntington, West Va.
W. E. Deegans Coal Co.

"Pay to the Order of Any Bank, Banker or Trust Co.
Prior Restrictive Endorsement Guaranteed
Feb 4 1921
Fifth-Third Nat'l Bank
Cincinnati, Ohio
13-31 13-31
Charles H. Shields, Cashier

"Pay to the order of Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
Feb. 3 1921
American Bank & Trust Co.,
Huntington, W. Va.
69-26
L. N. Frantz, Cashier
90
"Paid Thru Indianapolis Clearing House
Indiana National Bank, Indianapolis
Feb 5 1921"

117 The remainder of said Exhibits are similar to "D-1" being checks drawn by the Fairmount Glass Works payable to the W. E. Deegans Coal Company in varying sums and under different dates, and all endorsed by the W. E. Deegans Coal Company and by various banks and bankers, but none of them being endorsed to or by the Cub Fork Coal Company or Paragon Colliery Company, and the remainder of the said exhibits are omitted for the reason that the foregoing statement of their contents contains all that is material therein. The Fairmount Glass Works received no invoices whatever from the Cub Fork Coal Company and Paragon Colliery Company.

"Exhibit E" introduced by the witness, consists of a series of invoices rendered by the W. E. Deegans Coal Company to the Fairmount Glass Works for coal shipped under the contract in question. The first of said invoices is in the words and figures following, to-wit:

EXHIBIT E.

"Invoice No. 17308

W. E. Deegans Coal Company
Bituminous Coal
American Bank and Trust Building
Huntington, W. Va.

Oct. 25, 1920

Paragon #1

Sold To Fairmount Glass Works
Address Indianapolis, Ind. (Date Shipped)
Shipped To You, via Penna. 10/25

Caution!

(Coal Is Sold F. O. B. Mines)
(To avoid trouble in collecting claims)
(from railway companies, call the Railroad)
(Agent's attention to any damage or ap-)
(parent shortage and condition of car, and)
(insist upon him making proper notation)
(on receipted expense bill.)

Terms: Cash on Receipt of Invoice.

Initial	Number	Grade	Weight	Price	Amount	Your No.	Our No.
B&O	132414	ROM	1150	6.50	373	75	8039

118 (Stamped) Market and Financial Conditions make necessary following terms, Cash On Receipt of Invoice (In Pencil) Not paid

We, the undersigned, do hereby guarantee that the products listed herein are produced in accordance with the Federal Child Labor Act of September 1, 1916.

W. E. DEEGANS COAL COMPANY.

The remainder of said exhibits, bearing various dates in the year 1920, are filed, all being made out from the W. E. Deegans Coal Company to the Fairmount Glass Works for various amounts, and none of them bearing the name of the Cub Fork Coal Company or the Paragon Colliery Company. The remainder of the invoices are omitted for the reason that the foregoing contains all that is material herein excepting the invoice covering the shipment of December 9, 1920, which shipment is later referred to in "Exhibit F", and this invoice is here set forth as follows:

"Invoice No. 18482

W. E. DEEGANS COAL COMPANY
Bituminous Coal
American Bank and Trust Building
Huntington, W. Va.

Dec 9, 1920.
Paragon #1
(Date Shipped)
12/9

Sold To Fairmount Glass Works,
Address Indianapolis, Ind.
Shipped To You, via Penna

(Caution!)
(Coal Is Sold F. O. B. Mines)
(To avoid trouble in collecting claims)
(from railway companies, call the Railroad)
(Agent's attention to any damage or ap-)
(parent shortage and condition of car, and)
(insist upon him making proper notation)
(on receipted expense bill.)

Terms: Cash on Receipt of Invoice.

Initial	Number	Grade	Weight	Price	Amount	Your No.	Our No.
~~Erie~~	~~41494~~	Egg		6.50			7997
~~Pa~~	~~155029~~						
~~Pa~~	~~299739~~						
Pa	297048		886		287 95		

a/c Pay Market and Financial Conditions make necessary following terms, Cash On Receipt of Invoice.

Paid Jan 31 1921 OK CWR

119 We, the undersigned, do hereby guarantee that the products listed herein are produced in accordance with the Federal Child Labor Act of September 1, 1916.

W. E. DEEGANS COAL COMPANY.

The said omitted invoices cover eighty-five pages.

The defendant introduced in evidence a letter from the W. E. Deegans Coal Company marked "EXHIBIT F", which is in the words and figures following:

"W. E. DEEGANS COAL COMPANY
Bituminous Coal
American Bank and Trust Building
Huntington, W. Va.

Dec. 11, 1920

Fairmount Glass Works,
Indianapolis, Ind.

Gentlemen:

"Please refer to our shipping advise #18482 covering four cars and cancel Erie 41494, Pa. 115029 and Pa 299739 as these cars did not move to you.

Yours very truly,
W. E. DEEGANS COAL CO.
By C. R. GIBSON
Traffic Department."

120 One of the cars of coal mentioned in the telegram did arrive and was paid for by the Fairmount Glass Works. Prior to May, 1924, the second trial of this case, he did not know that the mines from which the coal came were not owned by the W. E. Deegans Coal Company. It was at the fourth trial of the case in 1928 in this court room, that he learned for the first time that the Cub Fork Coal Company and the Paragon Colliery Company did not even own the mines, but that the Dingus Coal Company owned the mines.

Cross-Examination.

The last trial was in 1928. The witness did not testify at that time. The witness testified at the third trial, but at the fourth trial he was not called to the stand, as he recalls. He does not remember now definitely.

The defendant thereupon introduces and reads in evidence "EXHIBITS G, H, I, J, K, L, M, N, O, P, and Q," which are in the words and figures following:

"EXHIBIT G.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal
American Bank and Trust Building
Huntington, W. Va.

July 14, 1920.

"Fairmount Glass Works,
Indianapolis, Indiana

Gentlemen:

"We attach hereto confirmation of telegram which explains itself.

"This is the price mentioned by our Mr. Dean. It would be our intention to ship all egg coal, although we might
121 find it necessary at times to ship some mine run in order to maintain regular deliveries. This is, as you know, a very low price under present conditions, and the only condition we wish to stipulate, is that the contract will be subject to cancellation in case the property should be sold. Mr. Deegans has been negotiating sometime with some parties for the sale of this property and these negotiations are still pending, and the only way we know to enter into contract at this time would be on these conditions, and if satisfactory, please advise and we will mail our regular contract to cover.

Yours very truly,
W. E. DEEGANS COAL CO.
By I. F. VASS"

IFV.J
7/16/20
JR

"Telegram.

"Huntington, W. Va. July 14, 1920.

"Fairmount Glass Works,
Indianapolis, Ind.

"Will contract your requirements egg coal at six fifty net ton mines subject conditions in letter today.

W. E. DEEGANS COAL CO."

EXHIBIT I.

"Aug. 19th, 1920

"W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

We are running a little short on coal and you are not shipping the full amount that is due us each month. We hope that you will be able to ship right along the full amount and make up for the difference that you have failed to ship in July and so far this month. We must have the full amount or else we will not have coal enough to run us.

122 "Hoping you will do all you can to get our coal to us, we are,

Yours truly,
FAIRMOUNT GLASS WORKS."

JHR/V

EXHIBIT J.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump and Egg)
(Island Creek)
(Eagle)
(Sterling Lump Royal Block)

General Offices Huntington, W. Va.

21 August 20

"Fairmount Glass Works,
Indianapolis, Indiana

All sales and Quotations subject to Conditions Printed on Back of This Sheet.

"Aug. 25 1920

Gentlemen:

"Referring to your letter of August 19th.

"I expect in order to keep up our regular monthly quota,

it will be necessary for us to ship a little mine run from time to time, but will try to give you full tonnage each month.

Yours very truly,
W. E. DEEGANS COAL Co.
By I F VASS

IFV'G

Annual Capacity 2,000,000 Tons

123 EXHIBIT K.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump & Egg)
(Island Creek)
(Eagle)
(Sterling Lump Royal Block)

"General Offices Huntington, W. Va.

Sept. 4th, 1920.

"Fairmount Glass Works
Indianapolis, Ind.

Gentlemen:

"All Sales and Quotations Subject to Conditions Printed on Back of This Sheet.

"Replying to your letter of September 1st.

"I find that we have shipped you only forty six (46) cars since July 1st which is about fourteen (14) cars short of your contract requirements. I have requested our shipping department to give this order close attention and make up this shortage if possible. Also, to see that the contract quota keeps moving to you regularly.

Yours very truly,
W. E. DEEGANS COAL COMPANY,
By I F VASS

IFV:L"

"Annual Capacity 2,000,000 Tons."

EXHIBIT L.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump & Egg)
(Island Creek)
(Eagle)
(Sterling Lump Royal Block)

"General Offices Huntington, W. Va.

Sept. 20th, 1920

"Fairmount Glass Works
Indianapolis, Ind.

124 "Gentlemen:

"All Sales and Quotations Subject to Conditions Printed on Back of this Sheet.

"Referring to our contract with you covering coal shipments.

"This is to advise that effective September 1st. an increase in wages estimated at approximately 27% was put into effect at the mines from which shipments are being made on this contract and on all coal shipments, after the date mentioned above, invoices will be rendered covering this advance as per Clause D in said contract.

"Will notify you the ~~approximate~~ exact amount just as soon as this has been ascertained.

Yours very truly,
W. E. DEEGANS COAL COMPANY
By I F VASS

IFV:L

"Annual Capacity 2,000,000 Tons."

EXHIBIT M.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump & Egg)
(Eagle)
(Sterling Lump Royal Block)

"General Offices Huntington, W. Va.

Oct. 16th, 1920

"Fairmount Glass Works,
Indianapolis, Ind. Oct 18 1920

"Gentlemen:

"All Sales and Quotations Subject to Conditions Printed on Back of This Sheet.

"Referring to your letter of October 14th.

"I find upon checking up our records that we shipped you in September on your contract one car of egg and 33 cars of mine run.

125 Effective October 4th the lake quota from mines in the Kanawha district was increased from 15% to 20% of their rated capacity and each individual mine has been forced to make up any accumulated shortages prior to that time. For this reason we have been compelled to ship the entire output of our mines to the lakes since that date but we are now up with our lake shipments and I have instructed our shipping department to see that coal moves regularly on your contract—egg when this is available and mine run when it is not.

Yours very truly,
W. E. DEEGANS COAL COMPANY,
By I. F. VASS

IFV:L

Will ship Paragon Coal

Annual Capacity 2,000,000 Tons

EXHIBIT N.

"W. E. Deegans Coal Company
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump & Egg)
(Island Creek)
(Eagle)
(Sterling Lump Royal Block)

"General Offices Huntington, W. Va.

Oct. 20th, 1920

"Fairmont Glass Works,
Indianapolis, Ind.

"Gentlemen:

"All Sales and Quotations Subject to Conditions Printed on Back of This Sheet."

"Referring to our contract with you covering 17,500 tons of Paragon and Cub Fork Coal.

"Clause D of this contract provides for an adjustment of the price to take care of any increase or decrease in wages paid employees at the mines covering the period of same. Effective September 1st. there was an increase granted to all day laborers and miners in the Kanawha district which 126 is estimated will amount to about 50c to 60c per ton.

We will give you the exact figure on this as soon as this has been worked out but we would thank you to give us your authority to increase the price of the contract in proportion to the increase in wages.

Yours very truly,
W. E. Deegans Coal Company
By I F Vass

IFV:L

10/23/30
J R

Annual Capacity 2,000,000 Tons

EXHIBIT O.

"Western Union Telegram.

"Received At 1920 Dec 13 PM 9 07
1920 Dec 13 PM 8 41 8 48 P
1920 Dec 13 PM 8 12

"Duplicate of Telegram Telephone

A60 60 25

Huntington W Va 851 P 13 Dec 15 1920

Fairmount Glass Works
Indianapolis Ind

"Wire I F Vass care Gibson Hotel Cincinnati tomorrow morning early if your Mr. John F. Rau will be in Indianapolis tomorrow afternoon or evening.

W. E. DEEGANS COAL CO.

DA 816P FBW
DA 821P FBW
DA OK 826P FBW

Adv Call About 11 P M FBW

EXHIBIT P.

"Western Union Telegram.

"Received At 1920 Dec 14 PM 2 55

"Duplicate of Telegram Telephone Dec 15 1920

"A409C 28

HU Cincinnati O 240 P 14

"John F. Rau

Fairmount Glass Works Indianapolis Ind

Your wire too late to catch noon train leaving at three o'clock would like to see you Claypool Hotel this evening. 127 If convenient join for dinner at seven.

I F VASS"

EXHIBIT Q.

"W. E. DEEGANS COAL COMPANY
Bituminous Coal

(Pocahontas New River)
(By Products)
(Paragon Steam)
(Cub Fork Lump & Egg)
(Island Creek)
(Eagle)
(Sterling Lump Royal Block)

"General Offices Huntington, W. Va.

Dec. 30th, 1920

"Fairmont Glass Works
Indianapolis, Ind.

"Gentlemen:

"All Sales and Quotations Subject to Conditions Printed on Back of This Sheet.

"Will you please advise whether or not you are going to be in position to take in any egg coal during the month of January? Our Paragon mines have been closed down since December 22nd. but will probably resume operations about the first of the month and we would like to know if you are going to be in shape to take in any coal and, if so, we will see if we can get together on some kind of an adjustment of this contract.

Yours very truly,
W. E. DEEGANS COAL COMPANY
By I F VASS

IFV:L

1/1/21/JR"

128 Exhibits "J" to "Q" inclusive bear on the back under conditions for the sale and delivery of the coal, the same printed matter appearing on the back of "Exhibit B" heretofore introduced in evidence and are here omitted as being unnecessary repetition.

The defendant thereupon offered and there being no objection, read in evidence a transcript of the testimony of John Rau, given in the third trial held November 12, 1925, as follows:

JOHN RAU, a witness called on behalf of the defendant, being first duly sworn, testified that he was President and General Manager of the Fairmount Glass Works in 1920 and 1921 and 1919; that when he went down to Huntington, West Virginia, about July 15th, 14th, 17th or 18th, 1920 that he met Mr. Deegan and Mr. Vass. That his company had a contract the previous year with the W. E. Deegan Coal Company for furnishing the coal for the Fairmount Glass Works. That that contract was made in his office; that when he went to Huntington, West Virginia, he had some conversation about the making of the first contract; that he asked the man who took that contract if they were the owners of the mine and stated to them that he would not contract with an agent or broker, that he wanted to deal direct, which he had always done before and after this occasion, with the mine owners. That this man said "We own the mines." That he told that to Mr. Deegan when he went back to contract the second time. The other contract had been with the W. E. Deegan Coal Company; that he went back to see the same company; that the name W. E. Deegan Coal Company was on the door of the company's office, and there he met W. E. Deegan and Mr.
129 Vass, who had testified in the case on trial. That he had to wait about two hours until Mr. Deegan came down from upstairs and they sat and talked a long time, and he related to Mr. Deegan what he had said with reference to making the first contract and Mr. Deegan said the Deegan Coal Company owns the mines. That he did make a contract there, signed it on that day, the 19th day of July 1920 and came home. That about the 14th of December 1920, Mr. Vass came to the office of the Fairmount Glass Company in the City of Indianapolis, and he talked with him about the performance of this contract, or the contract in suit. That there was another party with Mr. Vass at the time. That he complained to Mr. Vass a good deal about the fulfillment of the contract, stating that the Deegans Coal Company was not shipping the coal that he contracted for, that it was not even mine run that they took out the big lumps that it was slack and nut and a few lumps in it, and that they could not make gas out of that and keep their furnace. That he took him out and showed him the coal pile, which contained coal that came from the W. E. Deegans Coal Company; that the coal was covered pretty well with white like white-wash from lying out in the weather, there was a pretty fair pile of the coal and it had not been mixed with any other coal we had purchased. There was probably two

or three cars of it. That he looked at the coal as it came in, after his superintendent had called his attention, when he went out several times and looked at several cars and it was not even mine run. That now and then it had maybe four or six inch lumps. That all mine run has big lumps in it. A percentage of good mine run don't run as much slack as they have mentioned here. That he would call the coal received
130 by him, nut and slack, most of it with a few small lumps in it.

That when Mr. Vass was in the company's office in Indianapolis, that he told him that he could not use that kind of coal, if that was the kind of coal he was going to ship him. That he did not say he would not take any more, but told him that he would order coal when he wanted more coal. That at that time one factory was down and the other shut down shortly afterwards. That he never saw the Cub Fork Coal Company, the Paragon Colliery Company, never had any dealings with them, and did not know anything of them until it came up in court in May 1924. That before that he never had any knowledge or notice that anybody owned any interest in the contract in suit, other than the W. E. Deegans Coal Company.

Cross-Examination.

Witness testified that he dictated the various letters that had been introduced in evidence with the name of the Fairmount Glass Works by John Rau, President. The plaintiffs offered PLAINTIFFS' EXHIBIT NO. 32 in evidence as part of the cross-examination of the witness John Rau, which letter was admitted and read in evidence.

That Exhibit No. 19 which purported to have been written on April 26, 1921 was written by him an that that was after he knew all about the quality of the coal that he had been getting, and he contemplated contracting with the W. E. Deegans Coal Company for more coal of the same kind for the next year. That the coal was all right if he got what he ordered. That he was contemplating contracting with them for more coal and this was after he had complained that the coal they had been getting was very bad; that all he wrote about the coal being rotten, dirty or white was contained in the letters which have been read in evidence.

131 The defendant thereupon offered and read in evidence a transcript of the testimony of John Rau, given in the fourth trial held on May 25, 1928, as follows:

JOHN RAU, a witness called on behalf of the defendant, being first duly sworn, testified that he lived in Indianapolis, Indiana, residing in Indiana since 1889 and in Indianapolis for twenty-one years. That he is going on seventy-two years of age; that he was President and General Manager of the Fairmount Glass Works in the years 1919 and 1920. That he had been in the glass business about thirty-nine years and had been in the glass house about sixty-two years; had been carrying on the glass business since 1919 in the city of Indianapolis under the name of the Fairmount Glass Works.

That about July, 1920, he went to Huntington, West Virvinia, and saw Mr. Vass and Mr. Deegans. On their door was the name "W. E. Deegans Coal Company". That he had done business prior to that with the W. E. Deegans Coal Company in the office of the Fairmount Glass Works at Indianapolis. That he had had a contract for coal from them prior to that time. That he had a contract at that time for coal and explained to the man who took the contract what business he was engaged in, in the manufacture of glass. That when he went down to the Deegans Coal Company, in West Virginia, in July, 1920, he repeated what was said to the man who took that contract, to W. E. Deegans. That he told them that he would not contract with a company that were brokers or agents; that he only contracted with the company that owned the mines and that they said they owned the mines. Mr. Vass and Mr. Deegans both said that the Deegans Coal Company owned the mines. That he talked with them a couple
132 of hours and he talked with Mr. Vass before Mr. Deegans came in and then talked to both of them. That he told them that the men who took the first contract, told him that they owned the mines or he would not have contracted with them. That he was referring to the W. E. Deegans Coal Company when he said "them".

That he told Mr. Deegans and Mr. Vass that he was buying coal for gas making. That they mentioned the kind of coal that had been shipped out of their mines which he had tried before. Prior to haking the first contract they had tried several cars of coal and found it was good gas coal; that they had tried egg coal; that they had not tried any of the mine run when they were testing it out but used all egg when testing it out; that after the first contract was made they had used some mine run when they couldn't get the other.

That Plaintiffs' Exhibit No. 1 was signed in Charleston, West Virginia; in the W. E. Deegans Coal Company's office

at Huntington, West Virginia. That Exhibit No. 2 and Exhibit No. 3 were neither of them executed at that time. That Exhibit No. 46 is a duplicate of Plaintiffs' Exhibit No. 1. They were both signed in Deegans Coal Company's office at Huntington, West Virginia at the same time and Exhibit No. 46 was given to him.

EXHIBIT NO. 46 was offered, admitted and read in evidence.

That there were no endorsements on Exhibit No. 46. That Mr. Vass came to his office, the office of the Fairmount Glass Works, at Indianapolis, about December 15th and had another man with him; that he didn't know the other man's name; that he had a conversation with Mr. Vass at that time; that he
133 came to see if he wanted more coal and he told Mr. Vass that he had shipped bad coal and that he didn't want any more and he wasn't ready to take any more of that kind. That he took Mr. Vass and the other man out and showed them a pile of coal; that the kind of coal they were looking at at the time that he told him not to ship any more was the kind of coal that the Deegans Coal Company had been shipping them. That he told them that when they were in need of coal and he could ship the right kind of coal, the kind of coal that he bought, that he would notify him afterwards to ship coal. That that statement was made either while they were looking at the coal pile or back in the office; that they had quite a long conversation. That at that time they had a good many carloads of coal; that they have a track about half a mile long and there was coal strung all along that track. That they had to buy coal from them and other people and they had a lot of coal and one factory was shut down and a little bit later they shut down the other factory. That they were pretty well crowded and had to throw coal out outside; pure coal was picked up outside. That the coal that was received by the Fairmount Glass Company under the July 19, 1920, contract was received from the W. E. Deegans Coal Company and the W. E. Deegans Coal Company was paid for it. That he first learned that the W. E. Deegans Coal Company did not own the Cub Fork and Paragon Mines in 1924 in the court room on the trial of the case of the W. E. Deegans Coal Company against the Fairmount Glass Works. That he never heard of the Paragon Colliery Company before May, 1924, or of the Cub Fork Coal Company. That he had never seen the endorsement of "Plaintiffs' Exhibits No. 1" before that time nor Exhibits

Nos. 2 or 3. That he relied upon Mr. Vass and Mr. Dee-
134 gans statement that they were the owners of the mines. That he did not remember anything being said at the time of Mr. Vass's visit to his office in Indianapolis on December 15th, 1920, about a revision of prices on account of labor advances or anything. That he told him that when they needed more coal they would have them to ship it when they needed it, and he was talking to them about prices—getting lower prices.

Cross-Examination.

The witness testified that he was paying the contract price of the coal and that he asked the Deegans Coal Company to reduce the price; that he asked Mr. Vass and he didn't care to do it.

135 That Plaintiffs' Exhibit No. 10 was signed in Charleston, West Virginia; in the W. E. Deegans Coal Company's office at Huntington, West Virginia. That Exhibit No. 10A and Exhibit No. 3 were neither of them executed at that time. That Exhibit A of Defendant is a duplicate of Plaintiffs' Exhibit No. 10. They were both signed in Deegans Coal Company's office at Huntington, West Virginia at the same time and Exhibit No. A was given to him.

136 The defendant thereupon introduced in evidence "EXHIBIT A" which is the defendant's copy of the duplicate contract of which plaintiff's copy has been introduced in evidence as "EXHIBIT 10"; "A" and "10" are identical except that "A" does not bear any endorsement or assignment of any kind. Thereupon the defendant rested.

Whereupon the plaintiffs to further maintain the issues on their behalf, introduced the following evidence, to-wit:

J. F. VASS, a witness on behalf of the Plaintiffs, being recalled, testified as follows, to-wit:

Direct Examination.

"EXHIBITS 1 to 8" inclusive, are letters and telegrams between the Fairmount Glass Works and the W. E. Deegans Coal Company and are thereupon introduced in evidence. Plaintiffs' "EXHIBIT No. 33" introduced in evidence is

a letter from the W. E. Deegan Coal Company dated August 21, 1919, to the Fairmount Glass Works. The said "Exhibits 1 to 8," inclusive and "Exhibit No. 33" are in the words and figures following, to-wit:

137 "EXHIBIT NO. 1"

July 7, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:
Subject

Attention of Attn. Mr. Voss.

We wrote you a few days ago in reference to a contract for our next year's Coal supply on the same kind of Coal that we have been getting this year. Give us a price on Mine Run and also on Egg Size. We will use about 18,000 tons for the year, which will make about 1,500 tons per month.

We are very anxious to know as soon as possible just what you intend to do for us on next year's Coal supply. We will have to know as soon as possible, and the best price. We intend to run our Plant right thru the Summer with no shut-down so we must have Coal coming to us continuously. Please let us hear from you.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President

JR N

138 "EXHIBIT NO. 2"

July 10, 1920

Fairmount Glass Works,
Indianapolis, Ind.

Gentlemen:

Replying to your letter of July 7th.

Mr. Deegans who has charge of the operating Companies is out of the City at the present, but will return tomorrow and we will advise you Monday what we can do for you in

the way of contract covering your coal requirements this season.

Yours very truly,
W. E. DEEGANS COAL CO.
By I. F. VASS

IFV.J

139 "EXHIBIT NO. 3"

July 12, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject

Attention of

Your letter of the 10th.

We note that your Mr. Deegans who has charge of the making of contracts, is out of the city but that you expect him to return on the next day. We would like to know as soon as possible just what you intend to do about furnishing us with Coal for next season. We are needing Coal badly and must have this information promptly. If we are not going to get Coal from your Company we must get Coal elsewhere and we hope you will give us an answer as soon as possible.

We would like for you to ship all the Coal that is due us as soon as possible. Also after you have done this, keep shipping us Coal and give us your best price on it. We have to have Coal to keep operating right along. We use about 32 cars per month and it must be coming regularly, so please let the coal come on to us until we can make some further arrangements with you. We hope to hear from you promptly.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU,
President

JR N

140 "EXHIBIT NO. 4"

Telegram

Huntington, W. Va. July 14, 1920.

Fairmount Glass Works,
Indianapolis, Ind.

Will contract your requirements egg coal at six fifty net ton mines subject conditions in letter today.

W. E. DEEGANS COAL CO.

141 "EXHIBIT NO. 5"

July 14, 1920

Fairmount Glass Works,
Indianapolis, Ind.

Gentlemen:

We attach hereto confirmation of telegram which explains itself.

This is the price mentioned by our Mr. Dean. It would be our intention to ship all egg coal, although we find it necessary at times to ship some mine run in order to maintain regular deliveries. This is, as you know, a very low price under present conditions, and the only condition we wish to stipulate, is that the contract will be subject to cancellation in case the property should be sold. Mr. Deegans has been negotiating sometime with some parties for the sale of this property, and these negotiations are still pending, and the only way we know to enter into contract at this time would be on these conditions, and if satisfactory, please advise and we will mail our regular contract to cover.

Yours very truly,

W. E. DEEGANS COAL CO.

IFV J. By

142 "EXHIBIT NO. 6"

July 15, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject:

Attention of

We have your telegram reading as follows:

"Will contract your requirements Egg Coal at $6.50 net ton mines, subject conditions in letter today."

We note you say you are forwarding contract and price will be $6.50 net at the mines, subject to conditions in letter of same date.

We would like to have you ship us our full amount of Coal right along, also the balance of cars which are still due us on the old contract. Please let this Coal come along as soon as possible, also your contract.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JR N

143 "EXHIBIT NO. 7"

July 16, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We received your letter of the 14th and note carefully what you say in reference to a contract for Coal, same as we have been getting.

We would like for you to ship our Coal at the same amount per month as we have been ordering according to our old contract and as advised in telegram today, I will be there Monday, the 19th, and would like to meet your Mr. Deegans and close up the deal.

We are sorry to hear that the contract will have to be can-

celed in case the company is sold. Certainly we will have to take our chances on this but we would like to have at least sixty days leeway in case the company was sold, as we are paying a good price for Coal and the party who buys your Company should surely be willing to carry us along at least sixty days to give us a chance to get Coal elsewhere. We would like for you to consider this and I will take the matter up with you when I get there. I would also like to discuss with you the amount of Coal which is still due on our old contract. I would like to settle this before we pay the extra 20c per ton that we still owe as per agreement. The 10 cars that you mention are far short of what we should have and
144 I will have data showing the amount of Coal you shipped us during the life of the contract, as we figure it.

Yours truly,

FAIRMOUNT GLASS WORKS
Per JOHN RAU
Pres.

JR N

145 "EXHIBIT NO. 8"

Telegram

Fy Indianapolis Ind 354 P July 16, 1920

W. E. Deegans Coal Co.
Huntington W Va

Our Mr. Rau will be at your office Monday wire today whether Mr. Deegan will be there Monday

FAIRMOUNT GLASS WORKS
508 PM

146 "EXHIBIT NO. 8"

Telegram

Huntington, W. Va. July 16, 1920.

Fairmount Glass Works
Indianapolis, Ind.

Mr. Deegans out of town will wire tomorrow if he will be here Monday.

W. E. DEEGANS COAL CO.

147 EXHIBIT NO. 33.

Aug. 21st, 1919.

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

We had expected an immediate reply as to what we could depend on in regard to shipments of our Coal. You have not shipped a car since Aug. 6th, and this together with that shipped July 30th, July 31st, and July 21st, (one car each date) is still enroute. We haven't received any of them and ask that you trace vigorously to get this Coal to us. We are now ready to start and have no Coal and our losses will be very great for every day. You must keep in touch with us right along and advise us why you don't ship. We cannot wait a couple of weeks for an answer.

We would like for you to wire us on receipt of this letter just what we can depend on. We will now have to go out on the open market and buy Coal at a higher price, as we cannot see any way where you can get Coal to us in time to bridge us over. We notified you a day or so ago to ship eight cars per week.

It is not seven or eight days since we wrote you and we don't see any Coal coming our way yet. Please do all you can for us. You may ship in any kind of equipment you can get, but ship as many flat cars as possible.

Yours truly,

FAIRMOUNT GLASS WORKS.

JHR N
Copy

148 The witness does not recall that Mr. Rau called at the W. E. Deegans Coal Company, prior to the execution of the contract marked "Exhibit 10", and asked who owned the mines; nothing was said at the time about the ownership of the mines, or anything of the kind, according to his recollection. The witness did not make any statement to him about the ownership of the mines, since there was no occasion for it.

Cross-Examination.

The witness does not recall testifying at the last trial that the Deegans interests owned the mines, but it was a fact

that that the Deegans interests did own them. The witness does not recall, however, making such a statement or that the subject came up. Many things have occurred since the contract was written ten years ago. The witness does not think this was the first time he ever denied such a conversation with Mr. Rau.

W. E. DEEGANS, a witness on behalf of the plaintiffs, being recalled in rebuttal, testified as follows:

Direct Examination.

The witness recalls that John Rau of the Fairmount Glass Works came to his office in Huntington, July, 1920. Mr. Rau did not make any inquiry as to who owned the mines from which the Paragon and Cub Fork coal was produced, nor did he make any such inquiry of any person in the presence or hearing of the witness. The witness told Mr. Rau that he did not wish to make the contract as he was getting eleven dollars a ton for his coal at that time. No person in the presence or hearing of the witness made any statement as to the ownership of the mines. The Deegans Coal Company had its offices on the second floor of the American Bank
149 and Trust Building, and the witness on the third floor.

The witness recalls Mr. Rau and Mr. Vass coming to his office; on the witness' door at the time appeared the names of Paragon Colliery, Cub Fork Coal Company, Pocahontas Coal Company, Miller Pocahontas Coal Company, Virginia Smokeless Fuel Company, Royal Block Coal Company, and Zion Valley Fuel Company. At the top of the sign was the "W. E. Deegans Coal Interests," and the other names mentioned were below this. Among those appearing under "W. E. Deegans Interests" was the W. E. Deegans Coal Company, Cub Fork Coal Company and Paragon Colliery Company. This was on the door of the office to which Mr. Vass brought Mr. Rau.

Cross-Examination.

The witness testified that he remembered Mr. Vass and Mr. Rau coming to his office. This is impressed on the mind of the witness because he had all the mine books of the mining interests on the third floor. The witness did not show

these books to Mr. Rau, nor did he ask for them. Mr. Vass, the Sales Manager, could not close a contract without the consent of the witness. Mr. Vass was president of the W. E. Deegans Coal Company at different times. The contract was probably signed in Mr. Vass' office and brought up to the witness' office. That is the contract that the witness should sign was brought to his office. The witness' signature does not appear on the contract introduced in evidence as defendant's "Exhibit No. A." There was no reason why Mr. Rau should be brought to the witness' office, but he was brought. The ownership of the mines was never mentioned. The witness' recalls them coming up there particularly, because he was opposed to the taking of the con-
150 tract. The witness recalls very clearly that he was there.

This was ten years ago. There have been four trials of this case. The witness learned after he arrived here yesterday that Mr. Rau was dead. The witness has not previously testified, nor was his deposition taken in any of the other trials. The witness has seen some of the briefs in the case, but not the last one. The witness has been in the hospital occassionally for two years. The visit of Mr. Rau to the witness' office was he thinks in July, 1919. This was rather warm weather. The office of the witness was a corner room and all the doors were kept closed.

Redirect Examination.

The last time this case was tried the witness was in the hospital and not able to come. The witness did not know that the contract had been denied until this time. He did not know that until this time it had ever been denied that the Cub Fork and Paragon Colliery were parties to the contract.

Recross Examination.

No attempt was made to take the witness' deposition before the fourth trial. He did not know until a few weeks ago that the contract was being denied. The witness came into Huntington about a week ago and Mr. Hall told him the the case was to be tried and asked him to come. The witness at that time knew Mr. Rau was dead. The witness however would have come without regard to the death of Mr. Rau.

151 *Redirect Examination.*

Mr. Hall told the witness that it had been denied that the Cub Fork and Paragon Colliery Company were parties to the contract. He also told the witness that this was the first time this had ever been denied.

Recross Examination.

The witness has been practically out of the coal business for the last eight or nine months, but has left the management to his own people. When Mr. Rau came to Huntington in July 19, 1920 he sat in a chair at the right hand of the witness' desk and Mr. Vass on the other side. The witness did not offer Mr. Rau a cigar or anything to drink, though he had something in his office to drink. The witness does not think that the latter improves his manner.

I. F. VASS, being recalled on cross-examination, testified:

Q. I will ask you if, on the 12th day of November, 1925, at the third trial of this case, if the following questions were not asked you and if you didn't make the following answers to those questions:

"Question: It it not a fact that he said"—referring to Mr. John Rau's conversation with you at the time that he executed the contract, July 19, 1920— "Is it not a fact that he said he would not make the contract with anybody except people who owned mines? Answer: "I don't recall that," and if the further question wasn't asked you: "I will ask you if you didn't tell him that the Deegans Coal Company owned these mines? Answer: The Deegans Interests. Question: The Deegans Coal Company? Answer: No, sir. Question: And if he didn't say that he would not contract with anybody except mine owners, and that he contracted with you only because you owned the mines? "Answer: I don't
152 remember telling him that the Deegans Coal Company owned the mines, but the Deegans Interests." Were those questions asked you, and were those answers given by you?

A. They probably were.

Q. Now, does that refresh your memory?

A. I do not, at this time, recall that anything was said about it.

Q. Was your memory better on this day, on November 12, 1925, or is it better today, as to what actually occurred?
A. Well, it was nearer the time of the incident than it is now.
Q. And, therefore, better?
A. I would be more likely to recall it.

The foregoing was all the evidence introduced in the case, and both the plaintiffs and defendant rested.

Thereupon, the plaintiffs moved the court to direct the jury to return a verdict for the plaintiffs in the sum of $42,773.50, but the court denied the motion, and the plaintiffs excepted.

153 "EXHIBIT NO. 9"

July 10, 1920

Fairmount Glass Works,
Indianapolis, Ind.

Gentlemen:

Replying to your letter of July 7th.

Mr. Deegans who has charge of the operating Companies is out of the City at the present, but will return tomorrow and we will advise you Monday what we can do for you in the way of contract covering your coal requirements this season.

Yours very truly,
W. E. DEEGANS COAL CO.
By

IFV.J

154 "EXHIBIT NO. 11"

Aug. 25, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject:

Attention of I. F. Vass.
Your letter of the 21st.

It is understood that at any time you are unable to ship us our regular monthly quota of Egg Coal that it will be satisfactory to make up the shortage with Run of Mine. The big thing with us now is to get the Coal here on the ground,

so ship our full quota each month, and do all you can towards making up the balance of Coal due on our old contract.

We would appreciate a word from you as to how you are operating; the car supply, and the quantity of Coal you expect to be able to ship us in the next thirty days.

Yours truly,

JHR N FAIRMOUNT GLASS WORKS.

155 "EXHIBIT NO. 12"

Sept. 1st, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Attention of

We received a letter from you a few days ago stating you would be shipping us our full amount of Coal which is due us up to this time. We also notified you that if you did not have Egg Coal, you could make up the stortage with Mine Run. It is now the first of September and you are a great many cars short and we must have this full amount of Coal to enable us to run. We are running very short. Please do all you can to get all the Coal to us that is due, and make up the shortage for July and August. If we are going to run our Factory, we must have our full amount of Coal or we cannot run.

We would also like for you to make up the Coal which was confiscated by the Railroads. We are investigating this matter and we understand some of these railroads are confiscating Coal and have been selling it to other people and not using it for themselves. We wish you would help us look into this matter as they have no right to do that. They have only the right to take Coal in cases where they are short or there is a strike or something of that kind. We have this in-
156 formation from very good authority and are taking the matter up from this end. They have no right to take our Coal and speculate with it by reselling it to others.

Please let us hear from you as to what we may expect in the way of getting Coal due us and Coal due for this coming month.

Yours truly,
FAIRMOUNT GLASS WORKS
Per: JOHN RAU
Pres.

JR N

157 "EXHIBIT NO. 13"

Sept. 8th, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We are running short on Coal and you are not shipping us according to our contract. According to our agreement you promised to ship us 1000 tons in July, whereas you have shipped only 688½ tons. In August you were to ship us 1500 tons, whereas you shipped us 1099¾ tons. We need every bit of this Coal to keep us running. We would like for you to make up this shortage. If you haven't the Egg Coal, ship the Mine Run. We must have our full quota of Coal to enable us to run our factory full capacity. It will take every bit of it. We wrote you regarding this matter a few days ago, but you have not advised whether you would be able to ship our Full amount, and also make up the shortage on the two months. We would like to hear from you as to just what you can do. We must have Coal.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JR N

158 "EXHIBIT NO. 14"

Oct. 9th, 1920.

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject

Attention of

In checking up our records, we find that you shipped fairly well this last month, but you are short considerable tonnage for July and August. We would like to know if you cannot ship all of our Coal this month and make up for some of the shortages, as we need the full amount. Please let our Coal

come along according to our contract as we are now in full operation and need all the tonnage that we are entitled to from your Company.

Please advise us what we may expect.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JMR N

159 "EXHIBIT NO. 15"

Oct. 12th, 1920.

Fairmount Glass Works,
Indianapolis, Indiana.

Gentlemen:

Replying to your letter of October 9th.

The Lake quota for mines in the Kanawha district has been increased from 15% to 20% and each individual mine is being required to make up any shortage accumulated prior to October 4th. For this reason, we have been forced to ship practically all of our Paragon coal to the Lakes, also, coal from other mines in Logan County during the past week and we are, therefore, a little behind this month on our quota, but as soon as we get our Lake shipments caught up we will try to make up any shortage that may have been accumulated in the meantime.

Yours very truly,
W. E. DEEGANS COAL COMPANY.
By

IFV:L

160 "EXHIBIT NO. 16"

October 14th, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

Your letter of the 12th.

We note what you say in reference to shipping Paragon Coal to the Lakes and you are shipping us other Coal in place of the Paragon. While we are willing to receive any

kind of good gas Coal still we do not believe you should deprive us of the Coal we have contracted for—as much Egg and Paragon Coal as we should have. We are just as much entitled to it as some other people, as we have always been getting this coal.

At any rate, we would like to have you ship us any kind of Coal just so it is first-class Gas Coal. We can use Run of Mine, but we prefer Egg and the Coal we contracted for. Please ship us our full allotment and make up the shortage. You have been way behind in shipping in the last three months. We need this shortage. We are now buying Coal on the outside as you are not supplying us sufficient to run and we understand that cars are plentiful now and the railroads haven't much to do so we feel that you should ship us our full amount and make up for all shortages. We would like to have it in here because we need it, and to keep us from buying Coal in the open market. Please do all you can for us and get Coal to us as soon as possible.

Yours truly,

FAIRMOUNT GLASS WORKS,
Per JOHN RAU,
Pres.

JR N

(Part of "Exhibit No. 16.")

Deegans #2

161 Since writing the above we have checked this matter up and find you have only shipped us two cars in October. If you do not ship faster than this we will have to shut our Plant down. We don't believe you are treating us right in not shipping our Coal regularly, or at least notifying us as to why you cannot ship. This Coal must come more regularly or we cannot do business. We would like for you to get out ten cars at once to help us out.

F G WKS.

162 "EXHIBIT NO. 17"

Oct. 18th, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We have your letter of the 16th and note what you say about our Coal shipments and that you shipped 33 cars of Mine Run and one car of Egg in September. You are still considerably short for July and August and just as soon as you can, we would like for you to make up this shortage. We are running very close on Coal and we have had to buy on the outside, which is not very satisfactory.

You claim you had to ship 20% to the lakes, but that you now have it all shipped and will be able to ship us our full amount of Coal for this month. Now, we have to have some very quickly and we hope you will be able to ship all the Coal that is due us for this month and try to make up what you are short as soon as you can. Please do all you can to get Coal to us. We must have it quick or we will have to shut down.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JHR N

163 "EXHIBIT NO. 18"

Oct. 23d, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We have yours of the 20th in reference to our contract for 17500 tons of Paragon Cub Fork Coal to be taken at the rate of 1500 tons per month. Instead of getting Paragon Egg Coal, you have been shipping Mine Run, which is all right as long as you are unable to ship us enough Egg Coal. We have made no kick on this. The main complaint that we have is

that we are unable to get our full quota of Coal. You are considerably short on the various months, as we have written you previously, and you do not seem to be able or willing to make up the shortage.

Now, it takes the full amount of 1500 tons to run our Plant. We have to go out in the open market and pick up any kind of Coal available to keep us going on account of your not living up to your contract with us. There is no question that since we placed our contract with you that you have sold considerable Coal to other parties and that you are not filling prior orders like you should.

The price of Coal has come down since we placed our contract with you, but your Company is determined to keep raising it because of "Clause D" in the contract which states that in case there is an increase in labor, the price should be
164 added to the price of Coal agreed upon. This reads very plainly. A few days ago you wrote us that you would have to raise the price some twenty odd cents because you were now paying more for labor. Now you come back at us and say that we should pay fifty of sixty cents per ton additional. The advance that was given to the miners for surface men is the only raise that we know of and if we have to pay this, it should be governed by whatever the Government has agreed on

("Exhibit No. 19.")

Oct. 23d, 1920

W. E. Deegans #2

Subject

Attention of

with the miners and not the price that you set out it should be.

We do not think you should raise the price at all since the price of Coal is coming down, and you yourselves are not living up to your contract. The glass manufacturers have had a meeting this week and we all discussed what we were paying for Coal and we found that we are paying more than any of them. They are buying the Eastern Kentucky Coal, which is a good gas Coal, for less money than we are paying you. Conditions are getting better in every way—it is easier to get labor, also cars, altho we have to pay a great deal more for freight than when the contract was placed with you,—
165 and we do not think you should ask us more money for Coal. What you should do is live up to your obligations

and get the Coal to us. We have to write you about every other day begging you to ship coal, but we do not get the Coal, so we hope you will not ask us to pay more for coal and we would like to have you get our full quota of Coal due on contract, to us each month and in addition make up all shortages from other months. If we do not get Coal faster in the next few days, we will have to go out on the open market again, same as we have been doing, to keep our plant going. We do not think you should ask an increase so long as you do not live up to your contract.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JR N

166 "EXHIBIT NO. 20."

November 3, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

In October you shipped us 22 cars of Coal,—15 of which we received and 7 are still in transit.

We notice that the Coal you have been shipping is mostly slack, with only a few lumps in it. We haven't been getting any of the kind of Coal that we contracted for. You are supposed to ship Egg Coal or Lump or Mine Run. The Coal we have been getting has not been Mine Run. It is slack. We hope you will be able to ship our Egg Coal now and we would like to have you ship the shortage due us, as soon as possible. We are quite a number of cars short on the previous months. We are given to understand that cars are much easier to get and the railroads are not congested and you should be able to ship us our full amount of Coal and make up the shortage. Please let us hear from you what we may expect.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JR N

167 "EXHIBIT NO. 21."

Nov. 6th, 1920.

Fairmount Glass Works,
Indianapolis, Ind.

Gentlemen:

Attention: Mr. John Rau

Referring to your letter of November 3rd.

We are rather surprised at the complaints you make about the coal we have been shipping you, containing an excessive amount of slack. We have never shipped anything less than the mine run size and this is a fair grade of coal and from the same mine we have been making shipments from right along. It should contain the usual percentage of lump sizes.

We have shipped you thirteen (13) cars of mine run since November 1st and will be able not only to ship your full quota this month but make up a portion, at least, of the back tonnage. As stated in our recent letter, we feel that you can count on getting your full tonage from now on since practically all priority orders by the Interstate Commerce Commission have been canceled.

We want to assure you that we are going to make a special effort to get every pound of coal to you that the contract calls for and hope to be in shape at an early date to confine shipments to the egg size.

Yours very truly,

W. E. Deegans Coal Company

EFV:L By

168 "EXHIBIT NO. 22."

Nov. 11, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We have received yours of the 6th and note what you say—that you are surprised that your Coal contains so much slack. The Coal we have been getting from you lately is

mostly slack, and has very few lumps in it. We notice that all the Coal that you are shipping to us now is Mine Run. It seems to us that since Coal is much easier to get, that you should be able to ship us more Egg Coal such as we have contracted for. You were only to ship Mine Run in case that you were not able to ship the Egg. There is quite a difference to us in the two Coals. The Mine Run with a lot of slack in it does not go nearly as far as the Egg Coal and we think you should now begin to ship us Egg Coal.

In reference to raising the price of your Coal, we think you should lower the price instead of raising it, as Coal has come down considerably. On account of your inability to furnish us with sufficient Coal, we have been buying A #1 Eastern Kentucky best gas Coal and some Virginia Coal for $6.00 per ton. We have also been buying some Ohio Coal for $5.50.

You have not been shipping us the real Egg Coal that we have been contracting for so we do not see why you should ask more money and also ask us to pay the 20c per ton additionally, but you have not done it and the amount of Coal
169 still due us at last year's price would be worth more than paying you the 20c per ton.

Sometime ago, we had to go out on the open market on account of your inability to furnish us enough Coal, and pay higher prices. Now since prices have come down, we do not think it is right on your part to ask us to pay more. We really think you should meet the prevailing prices as the market reduces from time to time. A contract should work both ways, especially when you have not fulfilled your contract in not shipping us sufficient coal.

We hope you will be able, from now on, to ship us more Egg Coal and we would like to have Egg Coal altogether when you are not so crowded with orders as you have been.

Yours truly,

FAIRMOUNT GLASS WORKS,
Per JOHN RAU
President.

JR N

170 "EXHIBIT NO. 23."

December 1st, 1920

W. E. Deegans Coal Co.
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We notice, on checking up our records, that you have shipped us our full amount of Coal last month, and some extra. We are figuring on curtailing production for the next month or so and we now have a good supply of Coal on hand. While you were not shipping us sufficient Coal to operate, we had to go out and buy about 30 cars and some of it is coming in now. We are buying some of this Coal as low as $4.40 for first-class Eastern Kentucky Gas Coal and we are buying W. Virginia Gas Coal for $5.00. We think you should come down on your price and meet the prevailing prices now being offered. There is plenty of Coal in the market and we look for Coal, in the next week or two, to go down to as low as $4.00. Please let us know whether you intend to cut our price.

Until further notice,—that is, for the coming month, December, please do not ship us over three cars per week. We would like to have this Egg Coal as this is what our contract calls for and you are not shipping us any Egg Coal. Acknowledge receipt of these instructions.

Yours truly,
FAIRMOUNT GLASS WORKS
Per JOHN RAU
President.

JR N

171 "EXHIBIT NO. 24½."

Dec. 4th, 1920.

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We wired you today as follows:
"Stop all shipments to us until further notice. See letter."
We are intending to shut down our Plant, or part of it, on

account of lack of orders and we have plenty of Coal on hand at the present time to take care of us until we can decide whether we will continue running partly or shut down our entire factory.

This will also give you a chance to consider whether you will be able to revise your prices to the market price, prevailing at present. We have been offered good gas Coal today, Mine Run, at $4.25 per ton at the Mines and we look for it to come down still lower. There is plenty of Coal to be had now and while you have a contract with us at $6.50 for Egg Coal, you have not lived up to same, and we have a right to ask you to reduce your price.

Do not ship us any more Coal until further notice.

Yours truly,

FAIRMOUNT GLASS WORKS

Per JOHN RAU

President.

JR N

172 "EXHIBIT NO. 25."

Dec. 11th, 1920

W. E. Deegans Coal Co.,
Huntington, W. Va.

Gentlemen:

Subject

Attention of

We received invoice this morning, covering four cars of Coal, after we had notified you by telegram and letter on Dec. 4th, to ship us no more Coal.

Month before last you were not able to ship us but 15 cars and we had to go out on the open market and buy thirty odd carloads,—some at higher prices and some at lower prices. This Coal is all coming in now and we have had to shut down our #2 2 factory. We may possibly shut down our other Factory on account of general business conditions. We now have a very good supply of Coal on hand,—enough to last us for some time to come and for this reason we asked you to stop shipments.

We also think when we need more Coal sometime in the future, that you should meet the prices which are prevailing for #1 Gas Coal, either Eastern Kentucky or W. Virginia, at the time we ask you to ship again. We claim we have a

right to demand this because we had a contract with you last year and you raised the price but did not fulfill the contract and you also have not fulfilled this year's contract in not shipping us Egg Coal. You have shipped us nothing but Mine Run and a very inferior grade of Mine Run at that, with a lot of slack, and you did not ship the full amount as per our contract. We were always begging for Coal and you have not lived up

173 "EXHIBIT 25½."

to your contract in any way and by you not living up to your contract we have a right to come back at you and ask you to meet the prevailing price and we also have a right to refuse to live up to the contract. You had no right to ship these last four cars of Coal as we had notified you to discontinue shipments. We do not want any more Coal on hand than is necessary. We do not want to lay out any more money in piling up Coal when the market conditions for our product does not warrant it. We may shut down our other factory any day and have wired you as follows:

"We will refuse the four cars shipped Dec. 9th. We wired you Dec. 4th to stop all shipments."

We ask that you kindly give disposition on this Coal promptly.

Yours truly,

FAIRMOUNT GLASS WORKS

JHR N

174 **EXHIBIT NO. 26.**

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

W. E. Deegans Coal Company, a Corporation,
Plaintiff,
vs.
Fairmount Glass Works, a Corporation,
Defendant.
No. 8378.

COMPLAINT.

The W. E. Deegans Coal Company, plaintiff, complains of the Fairmount Glass Works, defendant, and says: That the plaintiff is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of West Virginia, and is a citizen of said State and has its principal office in the City of Huntington, in said State, and that the defendant is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of Indiana, and is a citizen of said State and has its principal office in the City of Indianapolis, in said State. That the amount and sum in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

That on the 19th day of July, 1920, plaintiff and defendant entered into a contract in writing, wereby the plaintiff sold and agreed to deliver to the defendant, and the defendant purchased and agreed to receive from the plaintiff Seventeen Thousand Five Hundred (17500) tons of coal to be shipped One Thousand (1000) tons per month in the month of July, 1920, and Fifteen Hundred (1500) tons per month during the months of August, September, October, No-
175 vember and December, 1920, and January, February, March April, May and June, 1921, subject to the terms and conditions specified in said contract, the terms of said contract to commence with the execution thereof, and to run and include June 1921, said contract being in the words and figures following, to-wit:

Here follows the contract introduced in evidence as PLAINTIFF'S EXHIBIT "10":

Plaintiff further says that after the making of the contract the plaintiff as directed by the defendant shipped and delivered from time to time to the defendant in compliance with the terms and conditions of said contract certain quantities of coal, and the defendant accepted and received the same until the month of December 1920, when the defendant refused to accept further shipments of said coal and to furnish shipping directions for shipments of said coal and notified the plaintiff that it would not accept any further shipments of said coal unless expressly ordered by it.

Plaintiff further says that it was at all times ready and willing and offered to ship and deliver to the defendant all the coal specified in said contract to be delivered by the plaintiff to the defendant under the terms of said contract during the months of December 1920, and January, February, March, April, May and June 1921.

Plaintiff further says that it performed all the terms and conditions of said contract required to be performed by plaintiff.

Plaintiff further says that the defendant is entitled to a credit of the sum of Forty-three Thousand One Hundred Eighty-nine Dollars and 68 cents ($43,189.68) paid to the plaintiff by the defendant for the coal shipped and delivered by the plaintiff to the defendant under the terms of said contract.

Plaintiff further says that the defendant is indebted to the plaintiff for the coal which plaintiff was ready and willing and offered to deliver to the defendant under the terms of said contract but which the defendant refused to accept and receive in the sum of Forty Thousand Dollars ($40,000.00) together with interest thereon and the defendant has re-
176 fused and still refuses to pay the same.

Wherefore, plaintiff demands judgment in the sum of Forty Thousand Dollars ($40,000.00) together with interest thereon from July 15th, 1921.

Paragraph II

The W. E. Deegans Coal Company, plaintiff, complains of the Fairmount Glass Works, defendant, and says: That the plaintiff is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of West Virginia, and is a citizen of the State of West Virginia, and has its principal office in the City of Huntington, in said State, and that the defendant is a corporation organized and

existing under, by virtue of and in accordance with the laws of the State of Indiana, and is a citizen of said State and has its principal office in the City of Indianapolis, in said State. That the amount and sum in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

That on the 21st day of April, 1919, plaintiff and defendant entered into a contract in writing, whereby the plaintiff sold and agreed to deliver to the defendant and the defendant purchased and agreed to receive from the plaintiff fifteen thousand (15,000) tons of coal to be shipped twelve hundred and fifty (1250) tons per month, during the months of July, August, September, October, November and December, 1919, and January, February, March, April, May and June, 1920, subject to the terms and conditions specified in said contract, the terms of said contract to commence with the execution thereof and to run to and include June 30, 1920, said contract being in the words and figures as follows, to-wit:

4-21-1919

Fairmount Glass Works,
Indianapolis, Indiana.

Has this day bought of the W. E. Deegans Coal Company, Huntington, W. Va.

Quantity: 1500 to be shipped in about equal monthly shipments of 1250 Tons, beginning July 1st, 1919, and ending June 30, 1920, as

Grade: Egg Coal per shipping instructions furnished by buyer.

177 Price: 2.35 per ton, F. O. B. Mines.

Terms: Cash due and payable to the W. E. Deegans Coal Company, Huntington, W. Va., not later than the 15th of each month for shipments made in preceding month.

Routing: c/o Indpls Union Ry Track #180.

Delivery:	Tons		Tons
April		October	1250
May		November	1250
June		December	1250
July	1250	January	1250
August	1250	February	1250
September	1250	March	1250

Equipment: Flat Bottom cars.

Expiration: June 30, 1920.

Weights: Actual railroad weights as ascertained on initial line by scale nearest loading point to govern all settlements. This contract is made, subject to strikes, accidents, car supply, Federal and State regulations, constraint of law and other causes beyond our control. The buyer and seller in entering into this contract realize the uncertainty of absolute deliveries growing out of strikes, casualties and other causes beyond the control of either party; and it is hereby mutually acknowledged to be the intent of this agreement that neither party shall be liable hereunder in any case where failure to perform or modified performance results by reason of matters beyond control of party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified above, insofar as the labor, the physical conditions of the respective plants and the ability of the carriers will permit and subject to the terms and conditions above set forth.

Signed in duplicate this 21st day of April, 1919.

W. E. Deegans Coal Company
By (signed) I. F. Vass,
Pres.

Fairmount Glass Works,
By (signed) J. Rau,
Pres.

Plaintiff further says that after the making of said contract the plaintiff as directed by defendant shipped and deliv-
178 ered from time to time to the defendant in compliance with the terms and conditions of said contract certain quantities of coal, and the defendant accepted and received the same and that on or about the 9th day of September, 1919, the plaintiff and defendant entered into a certain contract in writing by which it was agreed that the defendant would pay to the plaintiff twenty cents (20c) per ton over and above the contract price of said coal, subject to the terms and conditions specified in said contract, the terms of said contract to commence with the execution thereof, said contract consisting of certain letters and which contract is in the words and figures following, to-wit:

Fairmount Glass Works, "Sept. 4, 1919.
Indianapolis, Ind.

Gentlemen:—

We have a contract with you for 15000 tons of Paragon or Cub Fork Egg coal at $2.35 net ton mines, for shipment to June 30, 1920.

The price of the coal to be delivered under this contract was based on cost of production at the time this agreement was made.

Because of the enormous increase in the cost of living during the past few months and to meet conditions prevailing in competitive fields, the operators of the Guyan Valley district (from which the coal under our contract with you is to be shipped), found it necessary to grant to their employees, effective September 1st, a change in working hours, wage scale, etc., which it is estimated will advance the costs of producing coal in that district approximately 20c per ton.

We are, therefore, asking you for authority to add to the contract price this increased cost covering all coal shipped under our contract with you after September 1st. With this change in wage scale, coal, if shipped at the price originally named in the contract will be mined and shipped at a loss to the operators and in the spirit of fairness, we think you will recognize the justice of our position in making this re-
179 quest and will willingly grant the same. The actual increase in cost of production is all we want and as soon as this amount has been definitely determined, we will advise you.

Awaiting your reply with interest, we are,

Yours truly,

W. E. DEEGANS COAL COMPANY,

IFV/DP By

180 EXHIBIT NO. 27.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

W. E. Deegans Coal Company, a Corporation, *Plaintiff*,
vs.
Fairmount Glass Works, A Corporation, *Defendant*. } No. 8468.

COMPLAINT.

The W. E. Deegans Coal Company, plaintiff, complains of the Fairmount Glass Works, defendant, and says: That the

plaintiff is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of West Virginia, and is a citizen of said State and has its principal office in the City of Huntington, in said State, and that the defendant is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of Indiana, and is a citizen of said State and has its principal office in the City of Indianapolis, in said State. That the amount and sum in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

That on the 19th day of July, 1920, plaintiff and defendant entered into a contract in writing, whereby the plaintiff sold and agreed to deliver to the defendant, and the defendant purchased and agreed to receive from the plaintiff Seventeen Thousand Five Hundred (17500) tons of coal to be shipped One Thousand (1000) tons per month in the month of July, 1920, and Fifteen (1500) tons per month during the months of August, September, October, November and December 1920, and January, February, March, April, May and June, 1921, subject to the terms and conditions specified in said contract,

181 the terms of said contract to commence with the execution thereof, and to run and include June 1921, said contract being in the words and figures following, to-wit:

Here follows the contract introduced in evidence as PLAINTIFF'S EXHIBIT "#10":

Plaintiff further says that after the making of the contract the plaintiff as directed by the defendant shipped and delivered from time to time to the defendant in compliance with the terms and conditions of said contract certain quantities of coal, and the defendant accepted and received the same until the month of December 1920, when the defendant refused to accept further shipments of said coal and to furnish shipping directions for shipments of said coal and notified the plaintiff that it would not accept any further shipments of said coal unless expressly ordered by it, and defendant never ordered plaintiff to make any further shipments of said coal under its contract. While the said contract was still in full force and effect, to-wit, on or about the 4th day of December, 1920 and at divers subsequent times, the defendant repudiated the same and refused to accept further shipments of coal under the said contract. The defendant had in the month of December, 1920 received and accepted no more than 100 tons of the coal provided for in said contract, and there remained to be delivered in the month of December at least 1400 tons and in

the months of January, February, March, April, May and June, 1921, 1500 tons each, or an aggregate of 10,400 tons. The plaintiff was on the 4th day of December, 1920 at the time of the repudiation of the said contract and thereafter during the period therein provided, able, ready and willing to comply with the same and to ship the said coal and it was the duty of the defendant to accept and pay for the same, as provided; but notwithstanding the duty of the defendant, it refused to accept or to pay for any of said coal, from the 4th day of December, 1920 until the 1st day of July, 1921.

Plaintiff further says that it was at all times ready and willing and offered to ship and deliver to the defendant all the coal specified in said contract to be delivered by the plaintiff to the defendant under the terms of said contract during the months of December, 1920, and January, February,
182 March, April, May and June, 1921.

Plaintiff further says that it performed all the terms and conditions of said contract required to be performed by plaintiff, by shipping and delivering all the coal provided for in said contract, except all the coal provided to be shipped in December, 1920, January, February, March, April, May and June, 1921, and was prevented from shipping and delivering said coal in December, 1920, January, February, March, April, May and June, 1921, as provided in said contract by the defendants refusal to accept said coal.

Plaintiff further says that the daily and monthly market price of Paragon or Cub Fork egg and mine run coal, f. o. b. the Paragon Mines and the Cub Fork Mines, did not exceed the sum of $2.50 per net ton; and the plaintiff could have furnished to the defendant the said 10,400 tons of coal at a cost not exceeding the said sum of $26,000.

Plaintiff further says that the plaintiff was ready and willing and able and offered to defendant to deliver to the defendant under the terms of said contract all the coal provided for in said contract, but which the defendant refused to accept and receive, and the plaintiff was thereby damaged in the sum of Forty Thousand Dollars ($40,000) together with interest thereon.

Wherefore, plaintiff demands judgment in the sum of Forty Thousand Dollars ($40,000) together with interest thereon from July 15th, 1921.

DEEGAN & HALL,
CLARENCE W. NICHOLS,
Attorneys for Plaintiff.

Second Paragraph.

The W. E. Deegans Coal Company, plaintiff, complains of the Fairmount Glass Works, defendant, and says: That the plaintiff is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of West Virginia, and is a citizen of said State and has its principal office in the City of Huntington, in said State, and that the de-
183 fendant is a corporation organized and existing under, by virtue of and in accordance with the laws of the State of Indiana, and is a citizen of said State and has its principal office in the City of Indianapolis, in said State. That the amount and sum in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000).

That on the 19th day of July, 1920, plaintiff and defendant entered into a contract in writing, whereby the plaintiff sold and agreed to deliver to the defendant, and the defendant purchased and agreed to receive from the plaintiff Seventeen Thousand five hundred (17,500) tons of coal to be shipped one thousand (1000) tons per month in the month of July, 1920, and fifteen hundred (1500) tons per month during the months of August, September, October, November, and December, 1920, and January, February, March, April, May and June, 1921, subject to the terms and conditions specified in said contract, the terms of said contract to commence with the execution thereof, and to run and include June, 1921, said contract being in the words and figures following, to-wit:

Here follows the contract introduced as PLAINTIFF'S EXHIBIT "#10":

The plaintiff and the defendant entered upon the performance of the said contract and continued the performance of the same until about December 4th, 1920, at which time the said contract remained in full force and effect between the parties thereto, and the plaintiff was then and thereafter during the month of December, 1920, and thence to the 1st day of July, 1921, ready, able and willing to deliver the remainder of the coal called for by said contract and undelivered, to-wit: 10,400 tons, in monthly installments as required by the contract, and in all things to comply with said contract on its part and so notified the defendant. That defendant did not at any time request the shipment of said coal or any part thereof but on the contrary, in the months of December, 1920, and January, February, March, April, May and June, 1921,
184 refused to receive or pay for the same or any part thereof. The said coal on the 4th day of December, 1920, had decreased in value and thereafter further decreased in

value so that the plaintiff could realize therefor the sum of no more than Twenty-six Thousand Dollars ($26,000.00) and that the market price of all of said coal, to-wit, 10,400 tons, at the time and place fixed in said contract for the delivery of the same was no more than $26,000.00 whereby plaintiff was damaged in the sum of $40,000.00, for which it demands judgment, together with interest thereon from July 15th, 1921.

DEEGAN & HALL,
CLARENCE W. NICHOLS,
Attorneys for Plaintiff.

185 EXHIBIT NO. 28.

Statement of Coal Car Supply

	Paragon No. 1				Paragon No. 2			
1920	Ord'd	Sup'd	Loadd	% Supd to mine	Ord'd	Sup'd	Loadd	% Supd to mine
July	442.2	230.9	212.6	52.2	247.1	110.5	94.4	44.8
Aug.	466.0	250.8	234.6	53.8	229.8	133.6	86.0	58.1
Sep.	456.3	261.2	226.2	57.3	171.6	101.3	85.6	59.0
Oct.	394.4	219.2	210.8	55.6	137.2	80.2	80.0	58.4
Nov.	385.0	172.6	165.8	44.7	158.0	76.8	76.8	60.0
Dec.	272.4	108.0	108.0	39.7	128.0	52.8	52.8	41.2
1921								
Jan.	103.2	103.2	73.2	100.0	52.2	52.2	43.0	100.0
Feb.	74.2	74.2	74.2	100.0	26.4	26.4	26.4	100.0
Mar.	151.0	151.0	149.0	100.0	31.8	31.8	31.8	100.0
Apr.	84.0	84.0	84.0	100.0	29.4	29.4	29.4	100.0
May	317.0	317.0	220.6	100.0	186.6	186.6	143.6	100.0
June	343.2	343.2	285.6	100.0	181.0	181.0	147.4	100.0
	3489.7	2315.4	2044.6	66.4	1579.1	1062.6	897.2	67.3

	Cub Fork				
1920	Ord'd	Sup'd	Loadd	% Supd to mine	% Supd to C&O Field
July	205.8	95.2	77.2	46.3	48.4
Aug.	200.0	108.2	87.4	54.0	56.1
Sep.	168.3	102.5	64.0	60.9	57.8
Oct.	128.6	72.4	66.2	56.3	54.8
Nov.	142.0	66.2	65.2	46.7	51.1
Dec.	118.4	48.0	48.0	40.5	53.0
1921					
Jan.	49.0	49.0	37.2	100.0	100.0
Feb.	21.8	21.8	21.8	100.0	100.0
Mar.	43.4	43.4	43.4	100.0	100.0
Apr.	36.4	36.4	33.0	100.0	100.0
May	150.4	150.4	94.6	100.0	100.0
June	168.0	168.0	114.0	100.0	100.0
	1432.1	961.5	752.0	67.2	69.2

186 "EXHIBIT NO. 29."

This Agreement, made and entered into this 1st day of July, 1917, by and between the Paragon Colliery Company, a corporation created and existing under the laws of the State of West Virginia, hereinafter known as the Seller, party of the first part, and the W. E. Deegans Coal Company, a corporation, likewise created and existing under the laws of the State of West Virginia, hereinafter known as the Agent, party of the second part.

Witnesseth: That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, receipt whereof is hereby acknowledged, and the mutual benefits, covenants and agreements hereinafter made, the parties hereto agree as follows:

First: The Seller hereby constitutes and appoints the W. E. Deegans Coal Company its sole agent to sell, and agrees to ship to, or on orders of the Agent, the entire output of its mines located at Lolyn, Logan County, West Virginia, excepting and reserving, however, from this agreement that certain coal to be furnished to the C. & O. Railway Company from what is known as the Paragon No. 2 Mine, under the terms of a contract between the Seller and the said C. & O. Railway Company, said contract covering a period of the two years from April 1st, 1917.

Second: The Seller agrees to ship standard coal carefully prepared, and with all impurities removed, so far as possible, taking into consideration the kind and grades of coal produced at said Seller's mines, and using every care and precaution to prevent the shipment of coal of an inferior grade. The
187 shipment of coal of an inferior grade shall beat the risk of the Seller.

Third. The Agent agrees to pay the Seller between the 15th and 25th of each month for all shipments made the preceding month. The railroad weights of the initial line shall govern such settlements.

Fourth. The Seller agrees to ship coal on orders furnished by the agent and according to the instructions given by said Agent.

Fifth. The Agent agrees to use its best efforts to market said coal to the best advantage, and to secure the best market price at the time of contract or spot sale, and the Seller agrees that any contract or sale made by said Agent shall be binding

upon it the same as if by it made and entered into, provided, however, that said Agent shall make no contract to exceed the time when this contract is to expire.

Sixth. The agent shall receive a compensation for its services in and about the sale of said coal a sum equal to eight (8) per cent of the selling price, and these commissions shall be deducted monthly from the settlements made in accordance with the terms expressed in paragraph three of this agreement.

Seventh. This contract is made subject to strikes, accidents, car supply and other causes beyond the control of either or both parties hereto.

Eighth. This agreement shall continue in force until April 1st, 1918, and from year to year thereafter; but either party may terminate it by serving written notice upon the other party ninety days before the date of annual renewal, of its desire and intention to do so.

188 Ninth. The terms of this agreement shall be binding upon the respective parties hereto, their successors and assigns.

In Testimony Whereof, The parties hereto have caused this agreement to be executed in triplicate and signed by their respective officers duly authorized, the day and year first above written.

PARAGON COLLIERY COMPANY
By W. E. DEEGANS
President.

Attest:

.....
Secretary.

W. E. DEEGANS COAL COMPANY
By C. L. VAN ZANDT
Vice-President.

Attest:

.....
Secretary.

189 "EXHIBIT NO. 30."

This Agreement, made and entered into this 2nd day of July, 1917, by and between the Cub Fork Coal Company, a corporation created and existing under the laws of West Virginia, hereinafter known as the Seller, party of the first part, and the W. E. Deegans Coal Company, a corporation likewise

created and existing under the laws of West Virginia, hereinafter known as the Agent, party of the second part.

Witnesseth:

First: That for and in consideration of One ($1.00) Dollar cash in hand paid, the receipt whereof is hereby acknowledged, and of the agreements and covenants hereinafter set out, the Seller hereby constitutes and appoints the W. E. Deegans Coal Company as its sole Agent to sell its entire output, and agrees to ship said coal to, or upon orders furnished by said Agent, and in accordance with the instructions of said Agent.

Second. The Seller agrees to ship standard coal produced at its mines in good marketable condition, carefully prepared and with all impurities removed, so far as possible, taking into consideration the class and grades of coal mined by said Seller, using every care and precaution to prevent shipment of coal of an inferior quality. The shipment of coal of an inferior quality shall be at the risk of the Seller.

Third. The Agent agrees to sell all the coal the Seller produces.

Fourth. The agent agrees to use its best efforts to 190 market said coal to the best advantage, and to secure the best market price at the time of contract or spot sale, and the Seller agrees that any contract or sale made by said Agent shall be binding upon it the same as if by it made, provided, however, that no contract shall exceed the time when this agreement expires.

Fifth. This agreement is made subject to strikes, accidents, car supply and other causes beyond the control of either or both parties.

Sixth. The seller agrees to pay the Agent as a commission for the latter's services in selling said coal and in collecting accounts therefor a sum equal to eight (8) per cent of the selling price, these commissions to be deducted before making settlement with the Seller in accordance with the paragraph next following.

Seventh. The agent agrees to pay the Seller between the 15th and 25th of each month for all shipments of coal made during the preceding month, and railroad weights of the initial carrier shall govern such settlements.

Eighth. This agreement shall continue in force from July 1st, 1917, to April 1st, 1918, and from year to year thereafter; but either party may terminate it by serving notice in writing

upon the other party ninety days before the date of annual renewal, of its desire and intention to do so.

Ninth. The terms of this agreement shall be binding upon the respective parties hereto, their successors and assigns.

191 In Testimony Whereof, The parties hereto have caused this agreement to be executed in triplicate this 2nd day of July, 1917.

CUB FORK COAL COMPANY,
By W. E. DEEGANS
President.
W. E. DEEGANS COAL COMPANY,
By C. L. VAN ZANDT
Vice President.

192 "EXHIBIT NO. 32."

Beginning July 19, 1920 and ending Dec. 3, 1920.

Statement of Coal Shipped to Fairmont Glass Co. Showing amount paid for by them, amount confiscated by the Railroad Company.

1920	Month	Tons Delivered and paid for.	Tons Conf. by RR. Co.	Total tons shipped.
	July	63250	4535	67785
	August	105200	19095	124295
	September	161615	x x	161615
	October	90020	16230	106250
	November	203905	x	203905
	December	9320	x	9320
		633310	39860	673170

193 EXHIBIT NO. 34.

Nov. 1st, 1920

Fairmont Glass Works,
Indianapolis, Ind.

Gentlemen:

Attention: Mr. John Rau.

Referring to your letter of October 23rd. with reference to contract which we have with you covering 17,500 tons of Paragon or Cub Fork Coal.

We have taken the matter of increase in cost up with the mine and they have agreed to waive the privilege accorded them in Clause "D" and make no advance on this as the result of the wage increase effective September 1st. provided you will let us have check for the 20c per ton increase on the old contract and waive any claim you may have against us for short shipments on that contract. We still feel that we delivered the full tonnage under the old contract and that we are entitled to this increase anyway.

If this is satisfactory let us have your check and we will make no advance on the present contract.

We assure you that you can count on the full tonnage being delivered on this contract unless we are absolutely prevented from doing so by causes beyond our control. Failure to ship the full tonage heretofore has been due to just such conditions; namely, Federal regulations which made it absolutely imperative that we ship this coal to certain destinations at this time. We believe, however, that this trouble is about over and that you will have no further cause for complaint.

Awaiting your reply with interest, we are,

Yours very truly,

W. E. DEEGANS COAL COMPANY.

By

IFV:L

194 The introduction of the evidence and the arguments of counsel to the Jury having been concluded, the Court gave the following

INSTRUCTIONS TO THE JURY.

Gentlemen of the Jury:

The Cub Fork Coal Company and the Paragon Colliery Company bring suit against the Defendant, Fairmount Glass Works, the suit having been filed in July, 1924.

You are to try the facts in the case and you are not, therefore, interested in the reasons why the case has been sent back for trial by the Circuit Court of Appeals.

The Plaintiffs allege in their Complaint that they are corporations of West Virginia, organized under the laws of West Virginia, and that the Defendant is a corporation, organized under the laws of Indiana. I think that has been stipulated and agreed to by the parties. That confers jurisdiction on this Court, the amount susd for being over the amount required by the Federal Statutes.

The Plaintiffs allege that they entered into a contract with the Defendant on the 19th day of July, 1920, in which contract the Defendant agreed to purchase for the Plaintiffs and the Plaintiffs agreed to sell to the Defendant certain amounts of coal, covering a period ending July 1, 1921, the amounts of coal to be delivered by the Plaintiffs to the Defendant, so recited in the contract, being, the first month, one thousand tons and in each succeeding month, one thousand five hundred tons, of a certain quality of coal, described in the contract, at and for a price of six dollars and fifty cents per net ton, F. O. B.—which means free on board—cars at the mines.

The contract upon which the Plaintiffs rely for
195 recovery in this case is not signed by either of the Plaintiffs. It is signed by the Defendant, Fairmount Glass Works, and by W. E. Deegans Coal Company.

One of the exhibits introduced in the trial, which is one of the original contracts, has on the back of it certain endorsements. The duplicate of this contract does not contain this endorsement. You will have both contracts before you, as you may take them to your jury room to consult.

The Plaintiffs allege that the Defendant breached its contract and did not take the entire amount of coal according to the contract; that the Plaintiffs were ready, willing and able, at all times during the continuance of the contract, to perform and that they were prevented from performing by the action of the Defendant in cancelling the contract and in refusing to take all the coal covered by the contract; and the Plaintiffs allege that they were compelled to go out on the market and sell their coal at a less price than the contract price and that they were damaged in the sum of $32,417. They bring suit for this amount, with interest thereon at six per cent per annum since March 1, 1921.

The Defendant, answering this charge in the Complaint, file, first, a general denial. This puts the burden of proving the material allegations of the Complaint upon the Plaintiffs. The Plaintiffs have the burden of proving all the material allegations of the Complaint, by a preponderance of the evidence. The Defendant, answering further, alleges that the Plaintiffs agreed to ship a certain class of coal, but that they failed to perform their contract in that respect and that they furnished certain other classes of coal of less value to the

Defendant, when, as a matter of fact, they could
196 and should have furnished the coal provided for in the contract. The Defendant, answering further, says that

the Defendant was in the glass manufacturing business, all of which was known to the Plaintiffs, and that the Defendant must have a certain class of coal, which was known to the Plaintiffs; and that the Defendant, not receiving the coal under the contract that it was entitled to receive, was compelled to go out on the market and buy coal at a higher price than the contract price; and, further, that the Defendant stated to the representatives of the Deegans Coal Company, the actual singer of this contract, that the Defendant did not desire to contract with any broker or any agent, and that it would not contract for coal with any but the acual owners of the mines; that the Plaintiffs knew and the representatives of the Deegans Coal Company knew that Defendant would not contract with anyone but the owners of the mines, and represented to the Defendant that Deegans Coal Company was the actual owner of the mines.

To these answers the Plaintiffs file a general denial, which puts the burden of proving the material allegations of these affirmative Answers on the Defendant, by a preponderance of the evidence.

The Defendant also files a counterclaim, in which it alleges that it was damaged by reason of the fact that the Plaintiffs did not comply with their contract and ask for damages in the sum of two thousand dollars on their contract.

The Plaintiffs also, replying to the Defendant's Answers, allege that there was a shortage of cars and for this reason they were prevented, at certain times during the existence of the contract, from complying with all the provisions of the contract.

197 The Defendant also files what is termed in law an Answer non est factum—that is, it denies that it entered into a contract with these Plaintiffs. The language of that answer is, "That for a sixth paragraph of Answer the Defendant denies that Plaintiffs"—that is, the Cub Fork Coal Company and the Paragon Colliery Company—"executed the contract set out in Plaintiffs' Complaint."

Plaintiffs, then, answering further, allege that the Defendant knew, during the time this contract was in force, that the Deegans Coal Company was not the real owner of the mines and that, with that knowledge—with that full knowledge on the part of the Defendant, it contracted to operate under the contract and to demand fulfillment of the contract by the Plaintiffs.

The issues, as I have briefly described them to you, are

rather complicated. But it is not for you to attempt to decide the technical questions on the issues thus formed—the Complaint, the Answers, the Reply, the Answer of non est factum and the rejoinders.

The issues before you are rather simple. You are to determine the facts and you take the law from the Court.

There is no dispute between the parties that the contract—two copies of which have been introduced and marked as exhibits—was entered into by the Fairmount Glass Works, one of the parties, and by the W. E. Deegans Coal Company, the other party.

There is a material dispute between the parties, here, as to whether or not the Defendant refused to contract with
198 any company, or person, other than a mine owner or operator. And if you find that Defendant did so refuse to contract, and that the representatives of the W. E. Deegans Coal Company did misrepresent to the Defendant, claiming to own these mines, when, as a matter of fact, they did not own these mines, and these representations were relied upon by the Defendant, as an inducement to it to enter into the contract, then the Plaintiffs would not be entitled to recover in this action as undisclosed principals of the W. E. Deegans Coal Company.

The Defendant had a right, of course, to contract with any person, or refuse to contract with any person or any corporation; it had a right to know that the person with whom it was contracting, or the company with whom it was contracting, was the owner of the mines, if that was part of the consideration for making the contract. If you find that they did not make that known to the Defendant, and that Plaintiffs deceived the Defendant, then the Plaintiffs would not be entitled to recover, here, as the undisclosed principals of the W. E. Deegans Coal Company.

If, however, it entered into that contract, believing that it was dealing with the mine owner and that it later learned, through any information, that the W. E. Deegans Coal Company, or either of the Plaintiffs conveyed to it—if it did so learn from any source, that the W. E. Deegans Coal Company was not the owner of the mines, or the operators of the mines, and with that knowledge it continued to insist upon shipments under the contract and continued to demand that the Plaintiffs perform under the contract—if it did that and made those demands, with full knowledge that it had been
199 deceived, or with full knowledge that the W. E. Deegans Coal Company was, in fact, only the agent for the Plain-

tiffs in this case—I say, if it did that with that knowledge and then continued to demand performance of the contract, then it would be deemed to have waived those misrepresentations and the Defendant cannot avail itself, at this time, of those misrepresentations. A waiver, however, must be made with knowledge of the facts. A person or a company will not be deemed to have waived any legal right of which it did not have knowledge at the time of the waiver, as claimed.

If the Plaintiffs in this case were undisclosed principals of the W. E. Deegans Coal Company they have the right to bring this suit. But if the W. E. Deegans Coal Company was an independent contractor, contracting with the Defendant on its own behalf and not as agent of its undisclosed principals, or of any person—simply contracting for and on behalf of itself, with the Defendant, to sell the Defendant this coal and go out on the market and purchase the coal for the purpose of delivering to the Defendant the coal contracted for—I say that if the W. E. Deegans Coal Company contracted in that capacity, then it did not contract as the agent of the Plaintiffs and the Plaintiffs could not recover in this action.

The burden is on the Plaintiffs to prove, by a fair preponderance of the evidence, that the W. E. Deegans Coal Company was actually authorized by the Plaintiffs—the Cub Fork Coal Company and the Paragon Colliery Company—to act for them as their agent—to prove by a fair preponderance of the evidence the agency which it is alleged in the Complaint existed—the right and the authority to represent these Plaintiffs as their agent.

If the W. E. Deegans Coal Company was acting as the
200 agent of the Plaintiffs, with full authority to bind the Plaintiffs, then it was not necessary for the Plaintiffs to assume the obligations of this contract, for if their agent had full authority to write the contract and sign it in behalf of its principal, then the principal would be bound, as a matter of law, by the act of its agent, without any endorsement on the back of the contract of any assumption of the obligation; and, of course, it would not be necessary for the W. E. Deegans Coal Company to assign to the Plaintiffs any rights under that contract, because all the rights under the contract would inure to the benefit of the principal, even though the contract was taken in the name of the agent.

There are one or two instructions that I will read to you, submitted by the parties, and you will take them with the same force and effect as those which I have delivered, or may deliver, to you orally.

If the Jury finds that the Defendant entered into the contract on which suit has been brought, upon the expressed stipulation that the W. E. Deegans Coal Company owned the Paragon and Cub Fork Coal mines, and that the Defendant advised the W. E. Deegans Coal Company that Defendant wishes to contract only with a mine owner and not with a mere agent, or distributor, and if the Jury further finds that the W. E. Deegans Coal Company did not own mines but was merely acting as agent for the Plaintiffs, who were the actual owners, and that such fact was unknown to Defendant and not disclosed to Defendant, then the Plaintiffs cannot avail themselves of the doctrine of undisclosed principles, and recover damages from the Defendant as parties to the contract in suit,

201 and that neither W. E. Deegans Coal Company nor the Plaintiffs, in their capacity as assignees of the rights of the W. E. Deegans Coal Company, can recover any damages against the Defendant, if the said W. E. Deegans Coal Company did not own Paragon and Cub Fork coal mines.

I think I have fully covered that in my other instructions. I went a little further than that and said that they could not recover unless you find that with full knowledge of the facts the Defendant demanded performance and thereby waived that condition.

The Plaintiffs in this case pleaded and proved as a part of their case an assignment on the blank day of June, 1924, from the W. E. Deegans Coal Company to the Plaintiffs, of any and all rights and causes of action heretofore accrued, or hereafter to accrue, in favor of the assignor—W. E. Deegans Coal Company—against Fairmount Glass Works, a corporation of the State of Indiana, for damages arising out of the failure of said Fairmount Glass Works to fully perform the said contract which is here in suit. This assignment would only carry to the Plaintiffs such rights as the W. E. Deegans Coal Company had by reason of any breach claimed, which would have been only the right to recover their brokerage, or compensation, if the W. E. Deegans Coal Company was an agent as claimed in this trial.

That is to say, if the W. E. Deegans Coal Company was only the agent of the Plaintiffs, then they would have no interest in this contract, other than their commission, and that would be all they could sue for and that would be all that they could assign to the Plaintiffs. The Plaintiffs have offered no proof of any such damage by way of lost commissions to the W. E. Deegans Coal Company, and I instruct you that the

Plaintiffs can recover nothing by reason of such assignment.

202 The Defendant contends that the contract in suit was entered into only after Mr. Vass had represented that the W. E. Deegans Coal Company owned the mines. If this was so and the Defendant would not have entered into the contract but for such representation, then your verdict must be for the Defendant, unless subsequent thereto the Plaintiffs notified the Defendant of the inaccuracy of the representation, and the Defendant continued to demand performance of the contract.

I have already explained to you—that if the Defendant knew of the conditions, if it knew that the matter had been misrepresented to it, but after learning that fact it still insisted on the performance of the contract, then it would have been deemed to have waived that.

In deciding whether such notification was given by the Plaintiffs to the Defendant, or whether the Defendant, from any other source, learned of the exact situation—in case you find such misrepresentations were made to the Defendant—in deciding that question you may take into consideration all the evidence bearing on this point, including the letter dated November 1, 1920, in which the W. E. Deegans Coal Company stated it had taken the matter of increase in cost up with the mine and they have agreed to waive the privilege accorded them in Clause "d", Clause "d" being the clause in which it is provided that the price of coal might be varied in case there should be a change in the wages at the mines—and other evidence on the point, introduced by the Plaintiffs, on the one hand, and the Defendant, of course, on the other hand, and the fact that W. E. Deegans Coal Company first filed two complaints upon the contract in this court.

203 That is, your have the right to take into consideration that fact—that is all I am telling you—in deciding this question, and you have the right to consider it and give it such weight as, in your opinion, it is entitled to—the fact that the W. E. Deegans Coal Company, before this suit was filed, filed two other suits in this Court, to recover on this same identical contract.

You have the right to consider the fact that all correspondence was conducted on the letterhead of the W. E. Deegans Coal Company, and the names of the two Plaintiffs were never mentioned therein, at any time; also the fact that all checks were made payable to the W. E. Deegans Coal Com-

pany and were endorsed by it and were never endorsed by either of the Plaintiffs, so far as the evidence in this case shows; and the fact that Mr. Vass told Mr. Rau, as testified by Mr. Rau—if he did so tell him and you so find—that the mines were owned by the W. E. Deegans Coal Company; and the fact that all invoices were made on the billheads of the W. E. Deegans Coal Company and not on the billheads of the Plaintiffs. You have the right, I say, to consider all these things, together with all other facts introduced in evidence in this case, on that point.

It is not my purpose, in this case, and never has been, to discuss the evidence. I feel that that is the peculiar province of the Jury, to determine what weight is to be given to the evidence in the case.

You have heard all the evidence, you have seen the witnesses, you have had the exhibits read and discussed by you. It is your duty to decide upon the credibility of the witnesses and the evidence in the way of exhibits that have been introduced and to draw such legitimate inferences as you may feel the evidence justifies.

204 In determining the weight to be given the testimony of any of the witnesses, or evidence in the case, you have the right, and should consider the demeanor of the witnesses on the stand, who testified before you, their willingness, or unwillingness, to testify, as it appeared to you, their knowledge of the facts concerning which they testified; whether or not their evidence, their demeanor, their manner of testifying—whether or not they appealed to you as telling the truth or coloring their testimony; and, of course, any interest that any of the witnesses may have had, or may have in the result of this lawsuit. You have the right to consider all those things in determining the weight to be given to the testimony of any of the witnesses, and then give credit accordingly.

I said that certain of the parties had the burden of proving certain issues by a fair preponderance of the evidence. By that I mean that the evidence must weigh a little heavier on the side of the party who has the preponderance than it weights on the other side. If the scales are evenly balanced, then there is no preponderance and the party who has the burden of that preponderance must lose. If the scales weigh a little heavier on one side than on the other side, then that side may be said to have the preponderance. It is not the number of witnesses that always controls. The question for you to decide is which side convinces your minds by a fair

preponderance of the evidence, or the evidence weighing a little more on one side than the evidence weighs on the opposite side of the issue involved.

205 If you find that during the course of the trial any witness wilfully testified falsely upon any material issue in this case, you have the right to disregard all the rest of the testimony of such witness, excepting so far as it is corroborated by other credible testimony. And if, during the trial, any evidence was not produced which it was peculiarly within the power of either side to produce, then you have the right to presume that if such evidence had been produced, it would have been against the interest of the party within whose power it was to produce such evidence.

When you retire you will be sent the exhibits in the case and two forms of verdict. The verdicts are similar—"We, the Jury, find for the Defendant,"—you can use that form in case your verdict is for the Defendant. Or "We, the Jury, find for the Plaintiffs, and assess their damages in the sum of blank dollars;" in case your verdict is for the Plaintiffs, and you will fill in the blank in that form of verdict.

In the event you find that the Defendant did break its contract with the Plaintiffs—in the event you find that the Defendant did enter into a contract with the Plaintiffs as the undisclosed principals of the W. E. Deegans Coal Company, and the Plaintiffs are entitled to recover, then it would be your duty to fix the amount of the damages. And the measure of damages in this case, in the event you find for the Plaintiffs will be the value of the amount of coal which the Defendant refused to take and which the Plaintiffs were ready, willing and able to deliver during the life of the contract, at the price fixed in the contract at the time of the breach, less the

206 market price—that is, the difference between the contract price, as fixed by the contract, and the fair market price of that amount of coal which the Defendant should have taken under its contract, and which it did not take.

That is not stating it very clearly, but I hope I convey to you just what I mean. If you find that the Defendant broke its contract and did not take the coal that it should have taken from the Plaintiffs, at that time the Plaintiffs would be entitled to recover—if you find the Plaintiffs are entitled to recover—the difference between the value of that coal and the market price of such coal—its fair market value, and the contract price, plus six per cent interest.

Are there any exceptions or requests?

Mr. Noel: No exceptions, your Honor.

Mr. Hall: No exceptions, your Honor, but I suppose we get the benefit of the written requests which we passed up to the Court.

The Court: Make any record you want to.

Mr. Hall: We want the benefit of the requests that we made of the Court. I don't know that it is necessary to repeat them. I believe the Court has them there. We except to the refusal of the Court to give the written requests handed up to the Court. The Plaintiffs except to the refusal of the Court to grant the instructions in accordance with Plaintiffs' requests, numbered 1 to 11, both inclusive, and I suppose we will get the benefit of that exception separately, without going through them separately.

207 The Court: I am not the Circuit Court of Appeals and they will have to be the ones to rule on those questions.

Mr. Noel: We are not agreeing to anything, your Honor.

Mr. Remster: We don't want it understood that we are assenting to anything, your Honor.

Mr. Hall: The Plaintiffs except to the refusal of the Court to charge as requested in requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

The Court: Is there anything further, Mr. Hall?

Mr. Hall: Well, your Honor, it is not very material, but we want to put this in: The Plaintiffs except to so much of the charge of the Court as instructs the Jury that the Plaintiffs cannot recover unless they were principals and the W. E. Deegans Coal Company agent, at the time the contract was entered into; inasmuch as the Plaintiffs are entitled to recover upon their assignment, regardless of agency, although the Plaintiffs regard agency as fully proven.

The Court: Swear the Bailiff.

(The Bailiff was sworn.)

The Court: Gentlemen, you may retire with the Bailiff.

(Whereupon, the Jury retired to consider its verdict.)

Mr. Hall: My attention has been called to this, your Honor —and that is the charge of the Court as to the measure of damages would be the difference between the contract price and the market price at the time of the breach.

Mr. Noel: Your Honor, an exception must be taken while the Jury is present, and the Jury has already retired. We object to this.

208 The Court: Let it be shown that the Jury has retired in the custody of the Bailiff, and after the retirement of the Jury the attorney, Mr. Hall—

Mr. Hall: But before they reached their room.

The Court: Well, I don't know wehther they have reached their room, or not.

Mr. Hall: Well, let us state the time—within two minutes after the Jury left the jury-box. May I put that within two minutes after the Jury has retired?

The Court: Yes.

Mr. Hall: Counsel made this further exception and asked that the Jury be recalled and proper action taken, to-wit, that the Plaintiffs except to so much of the charge of the Court as states that the measure of damages is the difference between the contract price and the market price at the time of breach.

The Court: Isn't that the rule?

Mr. Hall: No, your Honor. It is the contention of counsel for Plaintiffs that the measure of damages is the difference between the contract price and the market price at the time specified in the contract for delivery. I don't believe the Court was right in that instruction which it gave.

The Court: Supposing you didn't deliver the coal when you should have delivered it, but you tendered it six months later?

Mr. Hall: Well, that is something else.

The Court: Well, that is what you asked for—at the time of delivery.

Mr. Hall: No, at the time called for in the contract for delivery.

The Court: Well, the jury has retired. We will take a short recess.

Whereupon, the trial of the cause was concluded.

209 The requests to charge above referred to as handed to the Court are in words and figures following: No request for these instructions was made in the presence or hearing of the jury.

THOS. W. SLICK
Judge.

210 * * (Caption) * *

PLAINTIFFS REQUESTS TO CHARGE.

The plaintiffs request the court to charge the jury in accordance with requests numbers one to eight inclusive, herewith tendered, with two provisoes:

First: If No. 1 be given, then all others are withdrawn.

Second. If No. 6 be given, then Nos. 5, 7, and 8 are withdrawn.

C. W. NICHOLS
CONNOR HALL
Attorneys for Plaintiffs.

211 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 1.

The plaintiffs request the court to charge the jury to return a verdict in favor of the plaintiffs and to assess their damages at $42,773.50.

C. W. NICHOLS
CONNOR HALL

212 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 2.

The plaintiffs request the court to charge the jury as follows:

The jury is instructed that in case you render a verdict in favor of the plaintiffs according to the instructions given you, then the amount of your verdict should be $42,773.50.

C. W. NICHOLS
CONNOR HALL

213 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 3.

The plaintiffs request the court to charge the jury as follows:

The court instructs the jury that the evidence in this case shows, and the court charges you that as a matter of law the defendant committed a breach of the contract sued upon.

C. W. NICHOLS
CONNOR HALL

214 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 4.

Thet plaintiffs request the court to instruct the jury that any alleged inferiority in the coal furnished under the contract of the defendant is no justification or defense to this action, but that the defendant by accepting the coal and calling for continued performance under the contract waived the defects in the quality, if any.

C. W. NICHOLS
CONNOR HALL

215 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 5.

The plaintiffs request the court to instruct the jury as follows:

The defendant has set up as a defense to this action that at the time of the negotiations with the W. E. Deegans Coal Company that either Mr. Vass or Mr. Deegans, or both of them, stated that the W. E. Deegans Coal Company was the owner of the mines of the Cub Fork Coal Company and Paragon Colliery Company from which the coal under the contract was to be furnished; and further sets up that inasmuch as the evidence shown that these mines were owned not by the W. E. Deegans Coal Company but by the plaintiffs, Cub Fork Coal Company and Paragon Colliery Company, there was therefore such misrepresentation as to relieve the defendant from the contract.

In this connection, plaintiffs have introduced a letter written under date of November 1, 1920, by the W. E. Deegans Coal Company to the defendant, in which it is stated "We have taken the matter of increase in cost up with the mines and they have agreed to waive the privilege accorded them in Clause D, and make no advance * * *" etc.

216 It is undisputed evidence that after the receipt of this letter by the defendant, it continued to call for shipments under and performance of the contract on the part of the plaintiffs. The court charges you that if the defendant learned from this letter of November 1, 1930, that the W. E. Deegans

Coal Company was not the owner of the mines from which the coal was furnished, then by thereafter calling for further shipments, the defendant waived any misrepresentation as to the ownership of the mines, if ever made, and cannot now set up such misrepresentation as any justification or excuse for nonperformance of the contract on its part.

C. W. NICHOLS
CONNOR HALL

217 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 6.

The court instructs the jury that the execution of the contract by the parties, the continuance of the same in existence until December 4, 1920, the breach by the defendant and the amount of damages are all shown in the evidence without substantial dispute, and upon these the court charges you as a matter of law that the issue is with the plaintiffs. The only issue remaining for you to determine is that of the misrepresentation claimed by the defendant. It is alleged that the W. E. Deegans Coal Company falsely represented that it was the owner of the mines from which the coal was to be furnished, and that as they were not owned by it, but by the plaintiffs Cub Fork Coal Company and Paragon Colliery Company, the defendant is therefore absolved from its obligations thereunder.

Upon this point there has been read the evidence of Mr. Rau that Mr. Vass and Mr. Deegans stated to him that the W. E. Deegans Coal company owned the mines, and it is now admitted that the Paragon Colliery Company and Cub Fork Coal Company were the owners. The plaintiffs made three answers to this.

218 First, Mr. Vass and Mr. Deegans deny that the representations set up by Mr. Rau were ever made by them and if you believe that they were not made, you will at once decide this issue for the plaintiffs and reinder a verdict in their favor for the sum of $42,773.50.

In this connection, the plaintiffs have introduced the testimony of witnesses and have set up that a majority of the stock of the W. E. Deegans Coal Company, of the Paragon Colliery Company, and of the Cub Fork Coal Company was all owned by the same parties and that these three companies

were under a common control and management, and that the officers controlling the W. E. Deegans Coal Company were able as officers of the Cub Fork Coal Company and Paragon Colliery Company to direct the disposal of the coal produced from those mines. The court charges you that if you should find it to be a fact that even though the statements were made as claimed by Mr. Rau, and even though the legal title to the mines was in the plaintiffs, nevertheless, if the three companies had substantially the same stock ownership, and were under the same control and management, and the same persons who were officers of the W. E. Deegans Coal Company were able as officers of the plaintiffs to direct the disposal of the coal produced from the Paragon Colliery Company and Cub Fork Coal Company, and if the Deegans Company was the agent of the Plaintiffs, then the court charges you that substantially Mr. Vass and Mr. Deegans would have been justified in saying that "We are the owners of the mines" and that it was immaterial where the legal title rested so long as the officers with whom the defendant dealt were able to control and direct the coal produced from the mines.

Further in this connection, the plaintiffs rely upon the letter of November 1, 1920 introduced as evidence, written by W. E. Deegans Coal Company to the defendant Fairmount Glass Works in which it is said: "We have taken the matter of the increase in cost up with the mines and they have agreed to
waive the privilege accorded them in Clause D, and make
219 no advance * * *" etc. and upon the evidence that after
the receipt of this letter the defendant continued to call for further shipments under the contract. If you find that the defendant by receipt of this letter of November 1, 1920, or otherwise, learned that the W. E. Deegans Coal Company was not the owner of the mines from which the coal was produced and thereafter called for further shipments, then it waived any misrepresentation as to the ownership of the mines, even though they were made, and if you should so find, then your verdict should be for the plaintiffs in the sum above stated, $42,773.50.

C. W. Nichols
Connor Hall

220 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 7.

The court instructs the jury that the eexcution of the contract by the parties, the continuance of the same in existence until December 4, 1920, the breach by the defendant and the amount of damages are all shown in the evidence without substantial dispute, and upon these the court charges you as a matter of law that the issue is with the plaintiffs. The only issue remaining for you to determine is that of the misrepresentation claimed by the defendant. It is alleged that the W. E. Deegans Coal Company falsely represented that it was the owner of the mines from which the coal was to be furnished, and that as they were not owned by it, but by the plaintiffs Cub Fork Coal Company and Paragon Colliery Company, the defendant is therefore absolved from its obligations thereunder.

Upon this point there has been read the evidence of Mr. Rau that Mr. Vass and Mr. Deegans stated to him that the W. E. Deegans Coal Company owned the mines, and it is now admitted that the Paragon Colliery Company and Cub Fork Coal Company were the owners. The plaintiffs make three answers to this.

221 First, Mr. Vass and Mr. Deegans deny that the representations set up by Mr. Rau were ever made by them and if you believe that they were not made, you will at once decide this issue for the plaintiffs, and render a verdict in their favor for the sum of $42,773.50.

C. W. NICHOLS
CONNOR HALL

222 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 8.

The court instructs the jury that:

The plaintiffs have introduced the testimony of witnesses and have set up that a majority of the stock of the W. E. Deegans Coal Company, of the Paragon Colliery Company, and of the Cub Fork Coal Company was all owned by the same plaintiffs and that these three companies were under a

common control and management, and that the officers controlling the W. E. Deegans Coal Company were able as officers of the Cub Fork Coal Company and Paragon Colliery Company to direct the disposal of the coal produced from these mines. The court charges you that if you should find it to be a fact that even though the statements were made as claimed by Mr. Rau, and even though the legal title to the mines was in the plaintiffs, nevertheless, if the three companies had substantially the same stock ownership, and were under the same control and management, and the same persons who were officers of the W. E. Deegans Coal Company were able as officers of the plaintiffs to direct the disposal of the coal produced from the Paragon Colliery Company and Cub Fork Coal Company, and if the Deegans Company was the agent of the Plaintiffs, then the court charges you that substantially Mr. Vass and Mr. Dee-
223 gans would have been justified in saying that "We are the owners of the mines," and that it was immaterial where the legal title rested so long as the officers with whom the defendant dealt were able to control and direct the coal produced from the mines.

C. W. NICHOLS
CONNOR HALL

224 PLAINTIFFS REQUEST TO CHARGE NO. 9.

That if the W. E. Deegans Coal Company in entering the contract sued upon was acting as the agent for the plaintiffs then either the agent or the plaintiffs could sue thereon.

C. W. NICHOLS
CONNOR HALL

225 PLAINTIFFS REQUEST FOR CHARGE NO. 10.

The court instructs the jury that the defendant, by calling for continued shipments of coal under the contract, waived any right it might have had to rescind or cancel the contract by reason of any shortage in any monthly shipment.

C. W. NICHOLS
CONNOR HALL

226 * * (Caption) * *

PLAINTIFFS REQUEST TO CHARGE NO. 11.

The plaintiffs request the court to charge as follows:
The court instructs the jury that the defense of fraudulent misrepresentation set up by the defendant cannot be considered by you unless the alleged misrepresentation was a material inducement to the defendant to enter into the contract sued upon, and if you find from the evidence that the defendant was willing and ready, and did enter into the contract, regardless of any alleged statement as to the ownership of the mine, then the plea of misrepresentation cannot be sustained, and should not be considered by you

C. W. NICHOLS
CONNOR HALL

227 And thereafter the plaintiffs filed a written motion that the Court set aside the verdict and grant them a new trial, which motion was overruled by the Court, to which the Plaintiffs excepted.

To the end now that the foregoing may become a part of the record in this cause, this bill of exceptions is now tendered by the plaintiffs, Cub Fork Coal Company and Paragon Colliery Company, and that prior to the same being allowed and signed, which is accordingly done, this the 12 day of Feb. A. D. 1931.

of The foregoing matter shall be certified to as constituting the bill of exceptions as aforesaid, as comprised in pages 1 to inclusive.

In witness whereof the foregoing has been duly allowed and signed by Thomas W. Slick, District Judge for the Northern District of Indiana, duly assigned to preside at the trial of this cause, to sign bills of exceptions, and to do all necessary things herein.

THOMAS W. SLICK
District Judge.

The foregoing Bill of Exceptions has been examined and is approved as correct this 10th day of January, 1931.

SMITH, REMSTER, HORNBROOK & SMITH
Attys. for Defendant.

228 Endorsed * * (Caption) * * Plaintiff's Bill of Exceptions. Filed Feb. 12 1931 Albert C. Sogemeier, Clerk.

84 (Entry for January 13, 1931, continued)

And the plaintiffs also file notice of appeal to Clerk, which notice is as follows:

85 * * (Caption) * *

NOTICE OF APPEAL.

To the Clerk of the District Court of the United States for the Southern District of Indiana, Indianapolis, Division.

You are hereby notified that the plaintiffs have prayed an appeal from a judgment in the District Court of the United States for the Southern District of Indiana in the above entitled suit, wherein the Cub Fork Coal Company and the Paragon Colliery Company are plaintiffs in error and the Fairmount Glass Works is the defendant in error, to the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago Thirty (30) days after the date hereof.

Dated at Indianapolis, Indiana, this 13th day of January, 1931.

CONNOR HALL
CLARENCE W. NICHOLS
Attorneys for Plaintiffs

Service of the above notice is hereby acknowledged this 13th day of January, 1931.

SMITH, REMSTED, HORNBROOK & SMITH
Attorneys for Defendant.

72 And afterwards to wit: at November Term of said Court, on the 13th day of January, 1931, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings were had herein to wit:

Come now the plaintiffs by their attorneys and file petition for appeal, and also file assignment of errors, which are as follows:

73 * * (Caption) * *

PETITION FOR APPEAL.

To the Honorable District Judge.

The above named plaintiffs, Cub Fork Coal Company and Paragon Colliery Company, feeling aggrieved by the judgment rendered and entered in the above entitled cause, on the 14th day of October, A. D. 1930, do hereby appeal from said judgment to the Circuit Court of Appeals for the Seventh Circuit for the reasons set forth in the assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals, under the rules of such Court, in such cases made and provided, and your petitioners further pray that the proper order relating to the required securities required of them be made.

CONNOR HALL
CLARENCE W. NICHOLS
Attorneys for Petitioners.

74 * * *(Caption) * *

ASSIGNMENT OF ERRORS.

Now come the plaintiffs in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause, from the judgment entered by this honorable court on the 14th day of October, 1930.

First.

The Court erred in overruling the motion of the plaintiffs to instruct the jury to find and return a verdict for the plaintiffs, and to assess their damages in the sum of $
to which ruling of the court the plaintiffs by their counsel at the time objected and excepted to the ruling of the court.

Second.

The court erred in refusing to give the following instruction to the jury as requested by the plaintiffs seasonably:

Plaintiffs Request to Charge No. 1.

The plaintiffs request the court to charge the jury to return a verdict in favor of the plaintiffs and to assess their damages at $42,773.50.

Plaintiffs Request to Charge No. 2.

The plaintiffs request the court to charge the jury as follows:

The jury is instructed that in case you render a verdict in favor of the plaintiffs according to the instructions given you, then the amount of your verdict should be $42,773.50.

75 **Plaintiffs Request to Charge No. 3.**

The plaintiffs request the court to charge the jury as follows:

The court instructs the jury that the evidence in this case shows, and the court charges you that as a matter of law the defendant committed a breach of the contract sued upon.

Plaintiffs Request to Charge No. 4.

The plaintiffs request the court to instruct the jury that any alleged inferiority in the coal furnished under the contract to the defendant is no justification or defense to this action, but that the defendant by accepting the coal and calling for continued performance under the contract waived the defects in the quality, if any.

Plaintiffs Request to Charge No. 5.

The plaintiffs request the court to instruct the jury as follows:

The defendant has set up as a defense to this action that at the time of the negotiations with the W. E. Deegans Coal Company that either Mr. Vass or Mr. Deegans, or both of them, stated that the W. E. Deegans Coal Company was the

owners of the mines of the Cub Fork Coal Company and Paragon Colliery Company from which the coal under the contract was to be furnished; and further sets up that inasmuch as the evidence shown that these mines were owned not by the W. E. Deegans Coal Company but by the plaintiffs, Cub Fork Coal Company and Paragon Colliery Company, there was therefore such misrepresentations as to relieve the defendant from the contract.

In this connection, plaintiffs have introduced a letter written under date of November 1, 1920, by the W. E. Deegans Coal Company to the defendant, in which it is stated "We have taken the matter of increase in cost up with the mines and they have agreed to waive the privelege accorded them in Clause D, and make no advance * * *" etc.

76 It is undisputed evidence that after the receipt of this letter by the defendant, it continued to call for shipments under and performance of the contract on the part of the plaintiffs. The court charges you that if the defendant learned from this letter of November 1, 1920, that the W. E. Deegans Coal Company was not the owner of the mines from which the coal was furnished, then by thereafter calling for further shipments, the defendant waived any misrepresentation as to the ownership of the mines, if ever made, and cannot now set up such misrepresentation as any justification or excuse for non-performance of the contract on its part.

Plaintiffs Request to Charge No. 6.

The court instructs the jury that the execution of the contract by the parties, the continuance of the same in existence until December 4, 1920, the breach by the defendant and the amount of damages are all shown in the evidence without substantial dispute, and upon these the court charges you are a matter of law that the issue is with the plaintiffs. The only issue remaining for you to determine is that of the misrepresentation claimed by the defendant. It is alleged that the W. E. Deegans Coal Company falsely represented that it was the owner of the mines from which the coal was to be furnished, and that as they were not owned by it, but by the plaintiffs Cub Fork Coal Company and Paragon Colliery Company, the defendant is therefore absolved from its obligations thereunder.

Upon this point there has been read the evidence of Mr. Rau that Mr. Vass and Mr. Deegans stated to him that the

W. E. Deegans Coal Company owned the mines, and it is now admitted that the Paragon Colliery Company and Cub Fork Coal Company were the owners. The plaintiffs make three answers to this.

First, Mr. Vass and Mr. Deegans deny that the representations set up by Mr. Rau were ever made by them and
77 if you believe that they were not made, you will at once decide this issue for the plaintiffs and render a verdict in their favor for the sum of $42,773.50.

The plaintiffs have introduced the testimony of witnesses and have set up that a majority of the stock of the W. E. Deegans Coal Company, of the Paragon Colliery Company, and of the Cub Fork Coal Company was all owned by the same plaintiffs and that these three companies were under a common control and management, and that the officers controlling the W. E. Deegans Coal Company were able as officers of the Cub Fork Coal Company and Paragon Colliery Company to direct the disposal of the coal produced from those mines. The court charges you that if you should find it to be a fact that even though the statements were made as claimed by Mr. Rau, and even though the legal title to the mines was in the plaintiffs, nevertheless, if the three companies had substantially the same stock ownership, and were under the same control and management, and the same persons who were officers of the W. E. Deegans Coal Company were able as officers of the plaintiffs to direct the disposal of the coal produced from the Paragon Colliery Company and Cub Fork Coal Company, and if the Deegans Company was the agent of the plaintiffs, then the court charges you that substantially Mr. Vass and Mr. Deegans would have been justified in saying that "We are the owners of the mines" and that it was immaterial where the legal title rested so long as the officers with whom the defendant dealt were able to control and direct the coal produced from the mines.

Further in this connection, the plaintiffs rely upon the letter of November 1, 1920, introduced as evidence, written by W. E. Deegans Coal Company to the defendant Fairmount Glass Works in which it is said: "We have taken the matter of the increase in cost up with the mines and they have
78 agreed to waive the privilege accorded them in Clause D, and make no advance * * *" etc. and upon the evidence that after the receipt of this letter the defendant continued to call for further shipments under the contract. If you find that the defendant by receipt of this letter of No-

vember 1, 1920, or otherwise, learned that the W. E. Deegans Coal Company was not the owner of the mines from which the coal was produced and thereafter called for further shipments, then it waived any misrepresentation as to the ownership of the mines, even though they were made, and if you should so find, then your verdict should be for the plaintiffs in the sum above states, $42,773.50.

Plaintiffs Request to Charge No. 7.

The court instructs the jury that the execution of the contract by the parties, the continuance of the same in existence until December 4, 1920, the breach by the defendant and the amount of damages are all shown in the evidence without substantial dispute, and upon these the court charges you as a matter of law that the issue is with the plaintiffs. The only issue remaining for you to determine is that of the misrepresentation claimed by the defendant. It is alleged that the W. E. Deegans Coal Company falsely represented that it was the owner of the mines from which the coal was to be furnished, and that as they were not owned by it, but by the plaintiffs Cub Fork Coal Company and Paragon Colliery Company, the defendant is therefore absolved from its obligations thereunder.

Upon this point there has been read the evidence of Mr. Rau that Mr. Vass and Mr. Deegans states to him that the W. E. Deegans Coal Company owned the mines, and it is now admitted that the Paragon Colliery Company and Cub Fork Coal Company were the owners. The plaintiffs make three answers to this.

First, Mr. Vass and Mr. Deegans deny that the representations set up by Mr. Rau were ever made by them and
79 if you believe that they were not made, you will at once decide this issue for the plaintiffs, and render a verdict in their favor for the sum of $42,773.50.

Plaintiffs Request to Charge No. 8.

The court instructs the jury that:

The plaintiffs have introduced the testimony of witnesses and have set up that a majority of the stock of the W. E. Deegans Coal Company, of the Paragon Colliery Company, and of the Cub Fork Coal Company was all owned by the same plaintiffs and these three companies were under a com-

mon control and management, and that the officers controlling the W. E. Deegans Coal Company were able as officers of the Cub Fork Coal Company and Paragon Colliery Company to direct the disposal of the coal produced from these mines. The court charges you that if you should find it to be a fact that even though the statements were made as claimed by Mr. Rau, and even though the legal title to the mines was in the plaintiffs, nevertheless, if the three companies had substantially the same stock ownership, and were under the same control and management, and the same persons who were officers of the W. E. Deegans Coal Company were able as officers of the plaintiffs to direct the disposal of the coal produced from the Paragon Colliery Company and Cub Fork Coal Company, and if the Deegans Company was the agent of the plaintiffs, then the court charges you that substantially Mr. Vass and Mr. Deegans would have been justified in saying that "We are the owners of the mines," and that it was immaterial where the legal title rested so long as the officers with whom the defendant dealt were able to control and direct the coal produced from the mines.

Plaintiffs Request to Charge No. 9.

The court instructs the jury that if the W. E. Deegans Coal Company in entering into the contract sued upon was acting as the agent for the plaintiffs then the agent or the
80 plaintiffs could sue thereon and the fact that the Deegans Coal Company instituted and dismissed two suits should not prejudice the plaintiffs in this action.

Plaintiffs Request to Charge No. 10.

The court instructs the jury that the defendant by calling for continued shipments of coal under the contract, waived any right it might have had to rescind or cancel the contract by reason of any shortage in any monthly shipment.

Plaintiffs Request to Charge No. 11.

The plaintiffs request the court to charge as follows:
The court instructs the jury that the defense to fraudulent misrepresentation set up by the defendant cannot be considered by you unless the alleged misrepresentation was a material inducement to the defendant to enter into the contract

sued upon, and if you find from the evidence that the defendant was willing and ready, and did enter into the contract, regardless of any alleged statement as to the ownership of the mine, then the plea of misrepresentation cannot be sustained, and should not be considered by you.

Wherefore the plaintiffs pray that the judgment of the District Court be reversed.

CONNOR HALL,
CLARENCE W. NICHOLS,
Attorneys for Plaintiffs.

81 (Entry for January 13, 1931, continued)
1931.

On petition of the plaintiffs herein, it is hereby ordered that an appeal to the United Circuit Court of Appeals for the Seventh Circuit from the judgment heretofore entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Seventh Circuit.

It is further ordered that a bond on appeal be fixed at the sum of Five Hundred Dollars ($500.00).

86 And afterwards to wit: at the November Term of said
1931. Court, on the 13th day of January, 1931, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings were had herein to wit:

Come now the plaintiffs in the above entitled cause and file their petition herein for the enlargement of the time in which to file their Bill of Exceptions herein which petition is in the words following, to wit:

(H. I.)

It is hereby ordered that the time for filing a bill of exceptions in the above entitled cause be and the same is hereby enlarged thirty days from this 13th day of January, 1931.

87 And afterwards to wit: at the November Term of said Court, on the 12th day of February, 1931, before the Honorable Thomas W. Slick, Judge of said Court, the following proceedings were had herein to wit:

Comes now the plaintiffs in the above entitled cause and file their petition herein for the enlargement of the time in which the Clerk of the United States District Court for the Southern District of Indiana, may have for filing the record in the United States Circuit Court of Appeals for the Seventh Circuit, which petition is in the words following, to wit:

(H. I.)

It is hereby ordered that the time for filing the record in the Circuit Court of Appeals in the above entitled cause be and the same is hereby enlarged sixty days from the 15th day of January, 1931, to March 15th, 1931.

232 And afterwards to wit: at the November Term of said Court, on the 13th day of March, 1931, before the Honorable Thomas W. Slick, Judge of said Court, the following proceedings were had herein to wit:

Comes now the plaintiffs in the above entitled cause and file their petition herein for the enlargement of the time in which the Clerk of the United States District Court for the Southern District of Indiana, may have for filing the record in the United States Circuit Court of Appeals for the Seventh Circuit which petition is in the words following, to wit:

(H. I.)

It is hereby ordered that the time for filing the record in the Circuit Court of Appeals in the above entitled cause be and the same is hereby enlarged thirty days to and including the 15th day of April, 1931.

1931. 229 And afterwards to wit: at the November Term of said Court, on the 12th day of March, 1931, before the Honorable Robert C. Baltzell, Judge of said Court the following proceedings in the above cause were had, to wit:

Come now the plaintiffs by their attorneys, and file praecipe for record, which praecipe is as follows:

230 * * (Caption) * *

PRAECIPE FOR RECORD TO UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

To the Clerk for the United States District Court For the Southern District of Indiana.

The Clerk will please prepare, certify and transmit a transcript of the record for the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause, including therein the following from the files and records of said Court:

1st. The complaint filed January 15, 1924;

2nd. Defendant's motion to separate cause of action filed September 23, 1925;

3rd. Plaintiffs' amended complaint, filed September 27, 1925;

4th. Defendant's answer and counterclaim, filed March 21, 1925;

5th. Plaintiffs' reply to answer and answer to counterclaim, filed April 24, 1925;

6th. Defendant's reply to plaintiffs' second paragraph of answer to defendant's counterclaim, filed May 9, 1925;

7th. Plaintiffs' amendment to complaint, filed October 15, 1927;

8th. Defendant's answer to plaintiffs' amendment to complaint, filed February 22, 1928;

9th. Plaintiffs' reply to defendant's answer, filed March 7, 1928;

10th. Trial, instructions of Court, and Verdict;

231 11th. Motion for judgment on verdict;

12th.

13th. Amendment filed before Judge;

14th. Petition for appeal;

15th. Assignment of errors;
16th. Order allowing appeal;
17th. The bond;
18th. Bill of Exceptions;
19th. The Praecipe;
20th. The Notice of Appeal.
21st. The Citation;
22nd. Order enlarging time for filing Bill of Exceptions;
23rd. Order enlarging time for filing Record.

CLARENCE W. NICHOLS
Attys for Plffs.

233 United States of America
Southern District of Indiana } ss:
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Cub Fork Coal Company, et al vs Fairmount Glass Works, No 8627 Law, according to the praecipe filed March 12, 1931, except Item 17 of said praecipe requesting bond, which bond is not of record in this office.

I further certify that the original Bill of Exceptions No. 1 and the original citation have been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 13th day of April, 1931.

(Seal)

ALBERT C. SOGEMEIER
Clerk United States District Court
Southern District of Indiana.

81 And the plaintiffs also file citation duly acknowledged by the defendant, which citation is as follows:

82 * * (Caption) * *

CITATION.

Filed Jan 13 1931

To Fairmount Glass Works Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago thirty (30) days after its date hereof, pursuant to an appeal which has been allowed by the United States District Court for the Southern District of Indiana, from a judgment in the District Court of the United States for the Southern District of Indiana in a suit wherein Cub Fork Coal Company and Paragon Colliery Company are plaintiffs in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, this 13th day of January in the year of our Lord one thousand nine hundred and thirty-one.

ROBERT C. BALTZELL
Judge.

Service of the above citation is acknowledged this 13th day of January 1931.

SMITH, REMSTER, HORNBROOK & SMITH
Attys for Defendant

83 (Endorsed) * * (Caption) * * Citation. Filed Jan. 13 1931 Albert C. Sogemeier, Clerk Connor Hall Clarence W. Nichols Attorneys for Plaintiffs

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 142, inclusive, contain a true copy of the printed record printed under my supervision and filed on the eighteenth day of February, 1932, on which the following entitled cause was heard and determined:—

Cub Fork Coal Company and Paragon Colliery Company,
Appellants,

vs.

Fairmount Glass Works,
Appellee.

No. 4554, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of August, A. D. 1932.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in the Seventh Circuit on the seventh day of October, 1930, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-Fifth.

Cub Fork Coal Company and Paragon Colliery Company, *Appellants,*
4554 *vs.*
Fairmount Glass Works, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And on, to-wit: On the twenty-third day of April, 1931, there was filed in the office of the Clerk of this Court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4554 October Term, 1930.

Cub Fork Coal Company and Paragon Colliery Company, *Appellants,*

vs.

Fairmount Glass Works,

Appellee.

The Clerk will enter my appearance as Counsel for the Fairmount Glass Works.

CHARLES REMSTER,
HENRY H. HORNBROOK,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
1100 Hume-Mansur Bldg.,
Indianapolis, Indiana.

Endorsed: Filed April 23, 1931. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in the said Seventh Circuit on the sixth day of October, 1931, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-One, and of our Independence the One Hundred and Fifty-Sixth.

And afterwards, to-wit: On the nineteenth day of January, 1932, there was filed in the office of the Clerk of this Court a Proof of Service, which said Proof of Service is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cub Fork Coal Company and Paragon Colliery Company,
Complainant and Appellants,
vs.
Fairmount Glass Works,
Defendant and Appellees.

The undersigned counsel for Appellee, the Fairmount Glass Works, hereby acknowledge that they have this day received two copies of the brief of the Appellants submitted upon motion to file appeal bond, this the fifteenth day of January, A. D. 1932.

SMITH, REMSTER, HORNBROOK and SMITH,
Attorneys for Fairmount Glass Works.

Endorsed: Filed January 19, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twentieth day of January, 1932, there was filed in the office of the Clerk of this Court a Motion of Appellants, which said Motion is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4554

Cub Fork Coal Company, a Corporation, and Paragon Colliery Company, a Corporation,
Complainant and Appellants,
vs.
Fairmount Glass Works, a Corporation,
Defendant and Appellee.

MOTION OF APPELLANTS.

Now come Cub Fork Coal Company and Paragon Colliery Company, Appellants, by Connor Hall, their Attorney, and herewith tender an appeal bond in the above entitled cause and respectfully shows to the court.

First: An appeal was allowed for by the Complainant and Appellants and allowed by the District Court and an appeal bond therein was fixed in the amount of Five Hundred and No/100 Dollars ($500.00), but such bond was not given at the time of the appeal.

Second: The said appeal has been docketed and is now pending in this Court. An appeal bond in the amount fixed by the District Court conditioned according to law in proper form and duly executed, by Appellants and Globe Indemnity Company as surety and same approved by the Honorable Thomas W. Slick, District Judge, before whom the case was tried, and is now lodged with the Clerk of this Court where it remains.

Third: Said bond was given and duly executed by the Globe Indemnity Company, a solvent surety Company, regularly doing a fidelity and surety business.

Appellants, therefore, pray that said bond may be filed in this Court as good and sufficient and in compliance with the Statute in such cases made and provided and in accordance with the practice of this Court; and that they may have such other and further relief as in the premises may be proper

and to the Honorable Court seem meet. And is in duty bound they will ever pray, etc.

CONNOR HALL,
Attorney.
CUB FORK COAL COMPANY and
PARAGON COLLIERY COMPANY,
Complainant and Appellants.

Endorsed: Filed January 20, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the second day of February, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, February 2, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:
Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Cub Fork Coal Company, *et al.*,
4554 *vs.*
Fairmount Glass Works.
} Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that leave be, and is hereby granted appellants in this cause to file their appeal bond instanter.

And on the same day, to-wit: On the second day of February, 1932, there was filed in the office of the Clerk of this Court, an Appeal Bond, which said appeal bond is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana

At Indianapolis.

Cub Fork Coal Company, a corporation, and Paragon Colliery Company, a corporation, *Plaintiffs,* *vs.* Fairmount Glass Works, a corporation, *Defendant.*	No. 8627.

BOND.

Know All Men by these Presents, That we, Cub Fork Coal Company and Paragon Colliery Company and the Globe Indemnity Company of New York, as surety, are held and firmly bound unto the above named Fairmount Glass Works in the sum of Five Hundred Dollars ($500.00) to be paid to said Fairmount Glass Works, to which payment, well and truly to be made, we bnd ourselves jointly and severally and our and each of our heirs, executors and administrators jointly by these presents.

Whereas, the above named Cub Fork Coal Company and Paragon Colliery Company have taken an appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse the judgment rendered in the above entitled suit by the District Court of the United States for the Southern District of Indiana: Now, therefore, the condition of this obligation is, that if the above named Cub Fork Coal Company and Paragon Colliery Company, shall prosecute their said appeal to effect and answer all costs and damages that may be adjudged or awarded against them, if they shall fail to make good their plea, then this obligation to be void; otherwise in full force.

Sealed and delivered this 8th day of December, 1931.

CUB FORK COAL COMPANY
By W. E. DEEGANS,
President.

PARAGON COLLIERY COMPANY,
By W. E. DEEGANS,
President.

GLOBE INDEMNITY COMPANY
By LESLIE COOMBS,
Attorney in Fact.
By G. D. MILLER,
Attorney in Fact.

State of West Virginia, } ss.
County of Cabell. }

I, Roy J. Howell, a Notary Public in and for the said State of West Virginia and County of Cabell, do hereby certify that Leslie Coombs and G. D. Miller, who signed the writing above for Globe Indemnity Company bearing date the 8th day of December, 1931, have this day in my said County, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 8th day of December, 1931.

My commission expires the 16th day of February, 1933.

ROY J. HOWELL,
Notary Public.

Approved: December 15, 1931.
THOMAS W. SLICK,
U. S. District Judge.

Endorsed: Filed February 2, 1932, Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twelfth day of April, 1932, the following further proceedings were had and entered of record, to wit:

Tuesday, April 12, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:
Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Cub Fork Coal Company
4554 *vs.*
Fairmount Glass Works

} Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 26, 1932.

And afterwards, to wit: On the twenty-sixth day of April, 1932, the following further proceedings were had and entered of record, to wit:

Tuesday, April 26, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

Cub Fork Coal Company, *et al.*
4554 *vs.*
Fairmount Glass Works

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Connor Hall, Counsel for Appellants, and by Paul Y. Davis, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to wit: On the fourth day of June, 1932, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4554. October Term, 1931, April Session, 1932.

Cub Fork Coal Company and Paragon Colliery Company, *Appellants,*
vs.
Fairmount Glass Works, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

June 4, 1932.

Before ALSCHULER and EVANS, *Circuit Judges,* and WILKERSON, *District Judge.*

EVANS, *Circuit Judge.* This case has been before this court on two previous occasions. 19 F. (2d) 273; 33 F. (2d) 420. Reference is made to these two opinions for a detailed statement of the facts. Briefly stated, appellants' action is one to recover damages for the alleged breach of a contract made with appellee whereby 17,500 tons of coal were sold at $6.50 per ton. Appellee denied any breach of its contract and sought by counterclaim to recover damages from appellants because of their alleged failure to deliver the coal as specified in the contract.

The agreement, which was in writing, called for the delivery of 1,000 tons in the month of July, 1920, and 1,500 tons each month thereafter. Coal was shipped pursuant to the contract as follows: July, 677.85 tons; August, 1242.95 tons; September, 1616.15 tons; October, 1062.5 tons; November, 2039.5 tons; and to December 4, 1920, 93.2 tons. On December 4, 1920, appellee wired appellants "Stop all shipments to us until further notice," and refused to accept four cars that arrived shortly thereafter. The price of coal slumped badly during the period covered by the contract. When appellee refused to take any more coal, the price had fallen some $2 below the contract price, and the bottom had not been reached. The jury returned a verdict in favor of appellants and assessed their damages at $1. Appellants moved to set aside the verdict and for a new trial, but the court overruled

this motion and entered judgment in appellants' favor for $1 and costs.

Without discussing the evidence bearing upon the issues which the pleadings tendered, we will merely observe that the verdict in favor of appellants upon the issues which determined liability was amply sustained by the evidence. In fact, as to all issues other than the amount of damages, the only debatable question was over appellants' right to a directed verdict. This was our conclusion on the previous appeal from evidence quite similar to that presented on the last trial. Inasmuch, however, as the reversal by this court was with directions to grant a new trial, the District Court properly held that all issues of fact had to be tried anew, and neither party was bound by the record made upon the previous trial. As the jury found in favor of appellants upon the issues determinative of liability, the assignments of error, which deal with questions arising out of such issues, may be ignored and our attention directed to those assignments which deal with the question of damages. As to this issue, the facts are not involved.

Appellee breached its contract without justification on December 4, 1920. The market price of coal is shown for each day of the month, and the average price per month is also disclosed, so that the actual amount of damages is quite definitely ascertainable. There is a slight discrepancy in the statements of witnesses who testified as to the market value of the coal. One witness, for example, placed the value of such coal in April at $2.60 to $2.70, whereas another witness placed it at $2.75 and another placed it at $2.90. This was the widest difference of opinion appearing in the entire record. There is also a difference in the testimony respecting the amount shipped and the amount received. This difference was due apparently to the fact that the railroads confiscated a small amount of the coal on several occasions.

Against appellants' damages, appellee sought to recover its alleged damages for appellants' failure to deliver the tonnage specified for the months of July, August, and October. The market value for coal for these months is likewise not in serious dispute. The contract called for the delivery of a total of 7,000 tons during the first five months. 6,638.95 were shipped.

It is evident that on any hypothesis appellants were entitled to recover over $18,000. The jury fixed the damages at $1. The verdict should have been set aside, and a new trial

ordered on appellants' motion. *United Press Assns.* v. *Nat. Newspapers Assn.*, 254 Fed. 284; *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399; *Stetson* v. *Stindt*, 279 Fed. 209; *James* v. *Evans*, 149 Fed. 136; *Glenwood Irrigation Co.* v. *Vallery*, 248 Fed. 483; *Smith* v. *United States*, 281 Fed. 696.

As a new trial is required the question arises, Should the parties again be permitted to litigate all of the issues presented by the pleadings or should the new trial be limited to an ascertainment of the damages? The recent case of *Gasoline Products Co.* v. *Champlain*, 283 U. S. 494, and the earlier case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, must constitute our guide in answering this question.

Prior to the announcement of the decision in the Gasoline Products Case, this court and numerous other federal courts had followed the practice approved in this decision. *C. & A. R. Co.* v. *Allen*, 249 Fed. 280; *Farrar* v. *Wheeler*, 145 Fed. 482; *Calaf* v. *Fernandez*, 239 Fed. 795; *Atteaux & Co.* v. *Pancreon Mfg. Corp.*, 22 F. (2d) 749; *Original Sixteen to One Mine* v. *Twenty-One Mining Co.*, 254 Fed. 630; 265 Fed. 469; *Empire Fuel Co.* v. *Lyons*, 257 Fed. 890; *Thorpe* v. *National City Bank of Tampa*, 274 Fed. 200; *Bird* v. *U. S.*, 24 F. (2d) 933; *U. S.* v. *Phillips*, 24 F. (2d) 195; *Drainage Dist. No. 7* v. *Sternberg*, 15 F. (2d) 41; *Chicago, Rock Island & Pac. R. Co.* v. *Stephens*, 218 Fed. 535.

We see no reason for directing a new trial on any issue other than damages.

In view of the Slocum decision, *supra*, we are not at liberty to direct judgment for such amount as we believe would fairly represent appellants' damages. We may, however, give the parties an opportunity to dispose of this cause without further litigation, and the case is one which loudly calls for such action. We have computed the appellants' damages upon the basis most favorable to appellee—that is, by taking the highest market price which the evidence would warrant. Likewise, we have assumed that appellee is entitled to recover something upon its counterclaim, and on such hypothesis we have figured its damages on market prices most favorable to it. The computations show appellants to be entitled to $18,250 with interest at the rate of five percent. from December 4, 1920.

The judgment must be, and will be, reversed unless within thirty days from the announcement of this opinion both parties file with the clerk of the court a consent to the entry of a judgment in appellants' favor, in the sum of $18,250 together with interest at the rate of five percent. from De-

cember 4, 1920, and costs, or in such other sum as may be agreed upon. In case such written consent is filed, then the judgment will be modified by inserting the sum of $18,250 or such other agreed sum and interest from December 4, 1920, and costs in the place of $1, and as so modified, the judgment will be affirmed. In case either party does not file such written consent within thirty days from the announcement of this opinion, the judgment will be reversed with costs, with directions to grant a new trial, but such new trial will be limited only to an ascertainment of the amount of appellants' recoverable damages and the amount of appellee's counterclaim if upon a new trial it appears that appellee is entitled to any recovery or set-off on its counterclaim.

Endorsed: Filed June 4, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fourth day of June, 1932, the following further proceedings were had and entered of record, to-wit:

Saturday, June 4, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

Cub Fork Coal Company and Paragon Colliery Company
4554 *vs.*
Fairmount Glass Works

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the judgment of the District Court of the United States for the Southern District of Indiana, Indianapolis Division in this cause must be, and will be,

reversed unless within thirty days from the announcement of this opinion both parties file with the Clerk of the Court a consent to the entry of a judgment in appellant's favor, in the sum of $18,250 together with interest at the rate of five per cent from December 4, 1920, and costs, or in such other sum as may be agreed upon. In case such written consent is filed, then the judgment will be modified by inserting the sum of $18,250 or such other agreed sum and interest from December 4, 1920, and costs in the place of $1, and as so modified, the judgment will be affirmed. In case either party does not file such written consent within thirty days from the announcement of this opinion, the judgment will be reversed with costs, with directions to grant a new trial, but such new trial will be limited only to an ascertainment of appellants recoverable damages and the amount of appellees counterclaim if upon a new trial it appears that appellee is entitled to any recovery or set-off on it's counterclaim.

And afterwards, to-wit: On the ninth day of July, 1932, the following further proceedings were had and entered of record, to-wit:

Saturday, July 9, 1932.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

Cub Fork Coal Company and Paragon Colliery Company
4554 *vs.*
Fairmount Glass Works

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant a new trial, but such new trial be lim-

ited only to an ascertainment of the amount of appellants recoverable damages and the amount of appellees counterclaim if upon a new trial it appears that appellee is entitled to any recovery or set-off on its counterclaim.

And afterwards, to wit: On the sixteenth day of July, 1932, there was filed in the office of the Clerk of this Court, a Praecipe for Supreme Court Record, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4454. October Term, 1930.

Cub Fork Coal Company and Paragon Colliery Company, *Appellants,*
vs.
Fairmount Glass Works, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

PRAECIPE.

To the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You will please prepare, certify and cause to be printed for use upon petition for certiorari to be filed in the Supreme Court of the United States, a complete transcript of the record in the above cause, including all proceedings of the United States Circuit Court of Appeals for the Seventh Circuit had therein.

SMITH, REMSTER, HORNBROOK & SMITH,
By PAUL Y. DAVIS,
Attorneys for Appellee.

Endorsed: Filed Jul 16, 1932. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 145 to 157, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with Praecipe for Record filed on the sixteenth day of July, 1932, in the case of

Cub Fork Coal Company and Paragon Colliery Company,
Appellants,

vs.

Fairmount Glass Works,
Appellee.

No. 4554, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of August, A. D. 1932.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following case No. 218, Kroger Grocery and Baking Co. vs. Yount.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 314.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, IND.

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IN THE

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OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

No. ————.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

May it Please the Court:

The petition of Fairmount Glass Works respectfully presents to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was an action at law for damages for an alleged breach of an instalment contract for the purchase and sale of coal, brought in the United States

District Court for the Southern District of Indiana by respondents, sellers, corporations of West Virginia, against petitioner, buyer, a corporation of Indiana (R. 2-11). Petitioner answered by denial (R. 31), counterclaim (R. 21-24), and certain affirmative defenses (R. 31-37). Of these defenses, at least one, paragraph V alleging misrepresentation (R. 35-36), was for the jury by express direction on a previous appeal. *Cub Fork Coal Co. v. Fairmount Glass Works*, 33 Fed. (2d) 420. At the last trial evidence on this issue was "similar" (R. 153). The issues were submitted to a jury which returned a verdict for respondents in the sum of One Dollar (R. 38). Respondents moved to set aside the verdict and for a new trial, which motion the trial court overruled (R. 38, 130), and entered judgment on the verdict (R. 39).

On respondents' appeal to the Circuit Court of Appeals for the Seventh Circuit, that court reversed the judgment of the District Court (R. 155-156), on the *sole ground* that "the verdict should have been set aside and a new trial ordered on appellants' (respondents') motion," assigning as reason that "on any hypothesis appellants were entitled to recover over $18,000.00." (R. 153-154.)

No error was found in any ruling or instruction of the court prior to verdict. In directing reversal it was assumed that the jury had correctly determined in respondents' favor every issue except that as to the amount of damages, and the new trial ordered was limited to the issue of damages. (R. 153.)

This petition seeks a review of the above mentioned judgment of the Circuit Court of Appeals for the Seventh Circuit. The opinion is found in the record at pages 152 to 155. It is not yet published.

II.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First: By said decision, the Circuit Court of Appeals for the Seventh Circuit, has assumed to reexamine the verdict of a jury otherwise than according to the rules of the common law, in conflict with Article 7 of the Articles in Amendment of the Constitution of the United States, as interpreted by this Court, and in conflict with the following applicable decisions of this Court.

Parsons v. Bedford, (1830) 3 Peters 433, 447-448;
Railroad Co. v. Fraloff, (1879) 100 U. S. 24, 31;
Wilson v. Everett, (1890) 139 U. S. 616, 621;
Chicago, Burlington & Quincy Railroad Co. v. Chicago, (1896) 166 U. S. 226, 246.

Second: By assuming to reverse a judgment at law rendered by a Federal Court for alleged error in overruling a motion for a new trial, said Circuit Court of Appeals for the Seventh Circuit has rendered

a decision in conflict with the following applicable decisions of this Court, viz.:

Marine Ins. Co. v. Young, (1809) 5 Cranch 187;
Barr v. Gratz's Heirs, (1819) 4 Wheaton 213;
Zacharie v. Franklin, (1838) 12 Peters 151, 163;
Browne v. Clark, (1845) 4 How. 4, 15;
Doswell v. De La Lanza, (1857) 20 How. 29, 32;
Warner v. Norton, (1857) 20 How. 448, 461;
Pomeroy's Lessee v. Bank of Indiana, (1863) 1 Wall. 592, 593-594;
Mills v. Smith, (1868) 8 Wall. 27, 32;
Holder v. United States, (1893) 150 U. S. 91, 92.

Third: By assuming to reverse a judgment at law rendered by a Federal Court upon the verdict of a jury solely because of alleged error of fact in the verdict and alleged error of the trial court in overruling a motion for new trial, said Circuit Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the following decisions of other Circuit Courts of Appeals, viz.:

Miller v. Maryland Casualty Co., (2nd C. C. A., 1930), 40 Fed. (2d) 463;
Keith v. Abrams, (3rd C. C. A., 1930), 43 Fed. (2d) 557;
J. W. Bishop Co. v. Shelhouse, (4th C. C. A., 1905), 141 Fed. 643;

Chicago, M. & St. P. Ry. Co. v. Heil, (8th C. C. A., 1907), 154 Fed. 626, 629;
American Trading Co. v. North Alaska Salmon Co., (9th C. C. A., 1918), 248 Fed. 665.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify to this Court for its review and determination, on a day certain to be therein named, all proceedings in the case numbered and entitled on its docket No. 4554, *Cub Fork Coal Company and Paragon Colliery Company, Appellants vs. Fairmount Glass Works, Appellee*, and that the judgment of said Circuit Court of Appeals therein be reversed by this Honorable Court and the judgment of the District Court of the United States for the Southern District of Indiana be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may be meet and just, and your petitioner will ever pray.

FAIRMOUNT GLASS WORKS,

By HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is found in the Record at pages 152-155. It has not yet been published.

II.

JURISDICTION.

The date of the conditional judgment of the Circuit Court of Appeals was June 4, 1932. (R. 155-156.) Final judgment of reversal was rendered July 9, 1932, (R. 156). The decision affirms that part of the verdict determining petitioner's liability, and limits the new trial ordered to the single issue of damages (R. 156-157).

III.

STATEMENT OF THE CASE.

Almost all essentials necessary to a consideration of this petition are set out in the petition under the "Summary Statement" (Petition, p. 1). As there pointed out, the issue of misrepresentation submitted to the jury (R. 118-119) under the express mandate of a previous appeal (33 Fed. (2d) 420) would have

authorized the jury to find a verdict for petitioner. For supporting evidence see R. 73, 75, 76-77.

It is believed that a discussion of the evidence as to damages is irrelevant. The issue of damages was submitted to the jury (R. 121).

IV.

ASSIGNMENTS OF ERROR.

The assignments of error are set forth in the petition under the heading of "Reasons Relied on for Allowance of the Writ" (Petition, pp. 3-5).

V.

SUMMARY OF ARGUMENT.

ONE.

By the decision in question, facts tried by a jury have been "reexamined otherwise than according to the rules of the common law" in violation of the Seventh Amendment, as interpreted by this Court.

TWO.

The decision in question also conflicts with the practice settled by many decisions of this Court applying this principle, to the effect that a trial court's action in overruling a motion for new trial is not reviewable for error of fact in an appellate court of the United States.

THREE.

The decision also conflicts with decisions of the Circuit Courts of Appeals of the Second, Third, Fourth, Eighth and Ninth Circuits, denying the power of an appellate court to reexamine facts tried by a jury.

ARGUMENT.

ONE.

By the decision in question facts tried by a jury have been "reexamined otherwise than according to the rules of the common law" in violation of the Seventh Amendment, as interpreted by this Court.

While this appellate proceeding was denominated an "appeal," pursuant to Act of 1928 as amended, it was governed by the same limitations as formerly governed writs of error (U. S. C. A., Title 28, Sec. 861b).

The action of the Circuit Court of Appeals in the present case is apparent from the opinion, without elaboration. No error was found in any proceeding of the trial court prior to verdict. The Appellate Court *examined the evidence*, concluded that the jury had made an *error of fact* in assessing the amount of respondent's recovery, and reversed the case *solely because the trial court had refused to set aside this verdict and award a new trial.* It is submitted that this constitutes the *reexamination* of facts tried by a jury *otherwise* than according to the rules of the common law, which is expressly forbidden by the Seventh Amendment.

The Seventh Amendment reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The effect of the phrase "no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law," was early established by this Court in its opinion in *Parsons v. Bedford*, 3 Peters 433, an opinion written by Mr. Justice Story in 1830. The outstanding legal scholarship of Justice Story makes it unnecessary to cite other authority for an exposition of the manner in which facts "tried by a jury" might be reexamined "according to the rules of the common law." Furthermore at that time the conception of trial by jury which had led to the adoption of the Seventh Amendment, was not matter merely of recorded history but of living memory, in the minds of the bar and of the Bench of this Court. The opinion in *Parsons v. Bedford* is therefore entitled to conclusive weight as determining the effect of this provision of the Constitution.

The Court said:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened the proceedings. The

Judiciary Act of 1789, c. 20, Section 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (Sections 22, 24) to this court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.

* * *

"The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceedings in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by a bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial.

"Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed."

Per Story, J., in *Parsons v. Bedford*, 3 Peters 433, 447-448, 449-450.

The principle has been many times reaffirmed. In *Railroad Company v. Fraloff*, (1879) 100 U. S. 24, a jury had returned a verdict for $10,000 for the value of baggage allegedly necessary to the personal use of a passenger which had been lost by a carrier. One

of the errors assigned called in question the reasonableness of a verdict that articles of such great value were proper baggage. The Court said:

> "No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the question of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

In *Wilson v. Everett*, (1890) 139 U. S. 616, it clearly appeared from the evidence that the plaintiff was either entitled to recover $5,000 or $15,000, or nothing, but the jury returned a verdict for $10,000. Among the errors assigned was the refusal of the trial court to set aside this verdict. In passing upon this question, the Court said:

> "The principal ground of complaint by the defendant seems to be that the jury had no basis for finding a verdict for $10,000, but that their

> verdict should have been for either $5,000 or $15,000. But this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimony. The case was fairly submitted to the jury, and the issues involved were passed upon by them."

In *Chicago, Burlington and Quincy Railroad v. Chicago*, (1896) 166 U. S. 226, 246, this Court had before it a jury verdict for one dollar, awarded as compensation for the taking of real property by eminent domain. This verdict was attacked as grossly inadequate under the evidence. Among other things, it appeared, as stated by Mr. Justice Brewer, dissenting, that the owners of similar tracts adjoining had been awarded five thousand dollars. Nevertheless, the majority of the Court, speaking through Mr. Justice Harlan, emphatically disclaimed its power, as an appellate court, to reexamine the facts tried by the jury.

The Court said:

> "Upon the reasoning in the case just referred to, it would seem to be clear that the last clause of the Seventh Amendment forbids the retrial by this court of the facts tried by the jury in the present case.
>
> * * *
>
> "The persons empanelled in this case to ascertain the just compensation due to the railroad company constituted a jury as ordained

by the constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the Seventh Amendment of the Constitution of the United States, the facts tried by it cannot be retried 'in any court of the United States otherwise than according to the rules of the common law.' The only modes known to the common law 'to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford*, 3 Pet. 433, 447, 448; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

"To this may be added that Congress has provided that the final judgment of the highest court of a State in cases of which this court may take cognizance, shall be reexamined upon writ of error, a process of common law origin, which removes nothing for reexamination but questions of law arising upon the record. *Egan v. Hart*, 165 U. S. 188. Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

166 U. S. 244, 245-246.

It is submitted therefore, that in assuming in the present case to examine the evidence and to determine

therefrom that "on any hypothesis appellants were entitled to recover over $18,000," and to reverse the judgment because "the verdict should have been set aside and a new trial ordered on appellants' motion," the Circuit Court of Appeals of the Seventh Circuit usurped a power clearly denied it by the Seventh Amendment.

Two.

The decision in question also conflicts with the practice settled by many decisions of this Court applying this principle, to the effect that a trial court's action in overruling a motion for new trial is not reviewable for error of fact in an appellate court of the United States.

Only a few of the many decisions of this Court so deciding are cited below. Further comment is unnecessary.

Marine Ins. Co. v. Young, (1809) 5 Cranch 187;
Barr v. Gratz's Heirs, (1819) 4 Wheaton 213;
Zacharie v. Franklin, (1838) 12 Peters 151, 163;
Browne v. Clark, (1845) 4 How. 4, 15;
Doswell v. De La Lanza, (1857) 20 How. 29, 32;
Warner v. Norton, (1857) 20 How. 448, 461;
Pomeroy's Lessee v. Bank of Indiana, (1863) 1 Wall. 592, 593-594;
Mills v. Smith, (1868) 8 Wall. 27, 32;
Holder v. United States, (1893) 150 U. S. 91, 92.

THREE.

The decision also conflicts with decisions of the Circuit Court of Appeals of the Second, Third, Eighth and Ninth Circuits, denying the power of an appellate court to reexamine facts tried by a jury.

Following are some, not all, of the cases in which Circuit Courts of Appeals of other circuits have refused to *reexamine* facts tried by juries, or to consider alleged errors of fact arising upon rulings upon motion for new trial:

Miller v. Maryland Casualty Co., (2nd C. C. A., 1930), 40 Fed. (2d) 463;
Keith v. Abrams, (3rd C. C. A., 1930), 43 Fed. (2d) 557;
J. W. Bishop Co. v. Shelhorse, (4th C. C. A., 1905) 141 Fed. 643;
Chicago, M. & St. P. Ry. Co. v. Heil, (8th C. C. A., 1907), 154 Fed. 626, 629;
American Trading Co. v. North Alaska Salmon Co., (9th C. C. A., 1918), 248 Fed. 665.

Cases apparently contrary, some of which are cited in support of the decision in the instant case, are analyzed by Judge Learned Hand in the case of *Miller v. Maryland Casualty Company, supra.* Speaking of instances in which appellate courts appear to have reversed for error of fact, he says:

> "However, so far as we have found, all the actual decisions except one, when this has been done, are either where the jury gave nominal

> damages, that is, where they did not attempt to appraise the plaintiff's loss at all; where their verdict was less than the amount of the loss which the defendant did not dispute; or where damages were not involved. In the first class is *Pugh v. Bluff City Excursion Co.*, 177 F. 399 (C. C. A. 6). In the second are *Glenwood Irrigation Co. v. Vallery*, 248 F. 483 (C. C. A. 8); *United Press Association v. National Newspapers Association*, 254 F. 284 (C. C. A. 8); and *Stetson v. Stindt*, 279 F. 209 (C. C. A. 3). In the third are *James v. Evans*, 149 F. 136 (C. C. A. 3), and *Frye v. Lyon*, 299 F. 926 (App. D. C.). All these are within the limits suggested in *Southern Ry Co. v. Bennett*, and the exception, *Cobb v. Lepisto*, (C. C. A.) 6 F. (2d) 128, (C. C. A. 9), so far as we can find stands alone."

It is believed that none of the cases discussed by Judge Hand, except *Cobb v. Lepisto*, (9th C. C. A., 1925), 6 Fed. (2d) 128, supports the action taken in the present case.

The supposed power to reexamine a verdict for nominal damages, for which is cited *Pugh v. Bluff City Excursion Co.*, (6th C. C. A., 1910), 177 Fed. 399, is negatived by the decision of this Court in *Chicago, Burlington and Quincy Railroad v. Chicago*, (1896), 166 U. S. 226, 246, discussed above.

Moreover, *Pugh v. Bluff City Excursion Co.* is not in fact such a case, since the Circuit Court of Appeals really reversed on account of the failure of the trial judge to give a more positive instruction against an award of nominal damage when the jurors inquired whether they might return such a verdict.

It is submitted further that the present case is not a true case of nominal damages; since if proper to speculate upon the deliberations of the jury, it is proper to assume that the one dollar represents the result of subtracting a substantial award on the counterclaim from a substantial award on the complaint.

The reason given in support of decisions of the second class cited by Judge Hand is illustrated by *Glenwood Irrigation Co. v. Vallery*, (8th C. C. A., 1918), 284 Fed. 484, where the trial judge had refused to set aside a verdict less than the amount of undisputed damages for which he had positively directed a verdict. The Court said:

> "No issue was submitted to the jury as to the amount of plaintiff's recovery. They were confined by the charge to determining defendant's liability for the fire. It is manifest, therefore, that the amount of the damages was not 'a fact tried by the jury,' within the meaning of the Seventh Amendment to the Federal Constitution."

Whether or not this reasoning be sound, it does not justify the reversal in the instant case, where the amount of recovery was sharply controverted and was submitted to the jury.

The case of *Stetson v. Stindt*, (3rd C. C. A., 1922) 279 F. 209, placed by Judge Hand in the same category and cited by the Court in the instant case, is chiefly noteworthy for the fact that of the sixteen cases cited by the Circuit Court of Appeals for the Third Circuit in support of its ruling, all but one were

from state courts not governed by the Seventh Amendment. The one Federal case was a decision of Mr. Justice Story at *nisi prius*, where he exercised his power as a trial judge, "according to the rules of common law," to set aside a verdict as against the evidence. It affords no support for such action by an Appellate Court.

The case of *James v. Evans*, (3rd C. C. A., 1906) 149 Fed. 136, should not really appear here at all, as the Appellate Court in that case reversed because the trial court had set aside a verdict. The Court did not reexamine the facts tried by the jury but the *facts tried by the court*, and the reversal directed that judgment be entered on the verdict.

One further case, cited by the Circuit Court of Appeals for the Seventh Circuit in support of its action in the present case, deserves mention. *Smith v. United States*, (4th C. C. A., 1922) 281 Fed. 696, was a criminal case. The Fifth Amendment which, rather than the Seventh, is applicable to criminal jury trials, contains no such limitation upon the power of appellate courts as the Seventh Amendment. Consequently no constitutional limitation prohibited the action of that court in setting aside a verdict of conviction as against the evidence.

It is believed that the confusion as to the power of an appellate court to "reexamine facts tried by a jury" evidenced by the decisions above cited, is alone sufficient to warrant the issuance of a writ of certiorari in this case. While decisions of this Court seem clearly to have denied the power which was as-

sumed by the Circuit Court of Appeals of the Seventh Circuit in rendering the decision now in question, the fact that that court conceived its action warranted by decisions of other Circuit Courts of Appeals (including one rendered in a criminal case) indicates that the true rule is frequently misapprehended and that Circuit Courts of Appeals not infrequently fall into the same error as did counsel in *Mills v. Smith*, 8 Wall. 27, 32, where Mr. Justice Grier said:

> "The counsel, in their arguments in this case, seem to have forgotten that this court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury."

Involving, as it does, the application of what Mr. Justice Story denominates the "more important" part of the fundamental guaranty of jury trial found in the Seventh Amendment, this petition presents a subject matter which should be placed beyond further question by a decision of this Court.

Respectfully submitted,

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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No. 314.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

REPLY BRIEF ON PETITION FOR CERTIORARI.

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.
No. 314.

REPLY BRIEF ON PETITION FOR CERTIORARI.

I.

The Circuit Court of Appeals was without power to pass upon the correctness of the verdict or the propriety of the action of the trial court in refusing to set it aside.

To say, as counsel contend, that the facts were not found by the jury, because the jury "ignored the facts,"[1] is obviously only another way of saying that the jury committed an error of fact. Even if the

[1] Respondents' Brief, p. 2.

error consisted in finding too little damage, rather than in finding for plaintiffs-respondents instead of for defendant-petitioner, the correction of the error involves reexamination of the facts found. "The only modes known to the common law to reexamine such facts are the granting of a new trial by the court where the issue was tried, * * * or the award of a *venire facias de novo*, by an appellate court for some error of law which intervened in the proceedings."[2]

The common law rule and the Seventh Amendment make no exception of cases "where the undisputed and uncontradicted evidence showed large and substantial damages."[3] On the contrary, it was not competent for an appellate court of the United States "to reverse the judgment for any error in the verdict of the jury at the trial."[4] "If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below."[5] The authority of an appellate court "does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties."[5] Any question as to the amount of the verdict could be

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[2] Story, J., in *Parsons v. Bedford*, 3 Peters 433, 448.

[3] Respondent's Brief, pp. 2-3.

[4] Story, J., in *Parsons v. Bedford*, 3 Peters 433, 450.

[5] Harlan, J., in *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

"reached only through motion for a new trial,"[6] and the Circuit Court of Appeals could not "review any error committed in that respect by the jury, if there were one."[6] No more could it "take cognizance of the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimon."[6]

The importance of the absolute discretion thus confided to the trial judge with reference to jury verdicts, is aptly illustrated by the instant case. It has been tried three times. Two previous verdicts *for petitioner* have been reversed. Even assuming (what we do not concede) that respondents, if entitled to recover at all, were entitled to substantial damage, the trial court doubtless concluded that by an overwhelming preponderance of the evidence, *respondents were not entitled to recover at all;* and reasonably assuming that a further trial would result in the same manner as the two preceding, decided that the ends of justice would best be served if the verdict, accepted by petitioner, were allowed to stand.

To assume, as have the Circuit Court of Appeals and Counsel for respondents, that the jury were "Daniels come to judgment" with respect to respondents' right to recover, but that both judge and jury violated their oaths with respect to the amount of damages, does violence to common sense.

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[6] Blatchford, J., in *Wilson v. Everett*, 139 U. S. 616, 621.

For an appellate court to set aside a verdict upon such a palpably fallacious assumption was not merely to usurp but to pervert the function of the *trial* judge, a function equally as essential in the traditional administration of the institution of trial by jury as the function of the jury itself.

II.

Respondents' assertion that petitioner lacks any substantial or meritorious defense is contradicted by the record and by two prior jury verdicts in petitioner's favor.

The pleading and proof of material misrepresentation by respondents' alleged agent, as to its own ownership of the source of coal supply, was alone a substantial and meritorious defense which on the last appeal, on evidence which Judge Evans characterizes as "quite similar" (R. 153), the court expressly directed should be submitted to the jury. 33 Fed. (2d) 420, 423.

Respondents' contention that this misrepresentation was not an inducing cause of the contract "because petitioner had already determined to enter into the contract," is not supported by the record. The first misrepresentation had been made over one year before (R. 73, 75) and was renewed prior to signature to the present contract (R. 73, 75). Petitioner's President, Rau, testified positively that he would not have contracted had he known the truth (R. 73, 75), and that he relied on the representation. (R. 77.)

The above is sufficient to establish at least *one* meritorious defense which deprives respondents' argument under this head of any validity.

We believe it is irrelevant and impertinent at this time to discuss in detail other equally meritorious defenses. However, since respondents erroneously assert that the above is the only defense which we claim should have been submitted we wish to point out briefly, that there were others.

We contend that the evidence shows no breach and that the decision of the Circuit Court of Appeals to the contrary (33 Fed. (2d) 420) is in conflict with applicable decisions of this court, namely: *Smoot's Case*, 15 Wall. 36; *Dingley v. Oler*, 117 U. S. 490.

We contend also that good defenses existed under paragraphs II, III, and IV of the answer. In asserting, without arguing, the insufficiency of these defenses, counsel ignore the fact that the sufficiency of the defense under paragraph IV has never been adjudicated, and that as to the others the decisions of the Circuit Court of Appeals will not conclude this court, should it become germane to consider them. That some of these defenses possess merit in fact is abundantly established by two prior jury verdicts for petitioner.

However, the only question which can be properly presented on the present record is whether or not any error of law affected the last verdict. This issue, we believe, must be resolved in petitioner's favor.

It is therefore respectfully submitted that the writ of certiorari should be granted, the judgment of the Circuit Court of Appeals reversed, and the judgment of the District Court affirmed.

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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No. 314.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF.

HENRY H. HORNBROOK,
PAUL Y. DAVIS,
Attorneys for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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IN THE

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OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS, *Petitioner*, v. CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY, *Respondents.*	No. 314.

PETITIONER'S SUPPLEMENTAL BRIEF.

May It Please the Court:

Simultaneously with the granting of the petition for certiorari, this cause was assigned for argument at a date only four weeks thence. Without knowledge of what alleged errors might be urged by respondents in addition to the one considered by the Circuit Court of Appeals for the Seventh Circuit, it did not seem practicable to prepare an additional brief which would be of any real assistance to the court within the time

allowed by the rules. Petitioner did not receive copies of the "Brief for Respondents," to which this is a reply, until exactly one week before November 7, the day assigned. It was then impossible to prepare and serve this reply within one week of the day assigned.

The following brief is prepared solely with the idea that if the court sees fit to consider the alleged errors urged in respondents' latest brief, this brief may facilitate such consideration.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has now been reported *sub nom. Cub Fork Coal Company, et al. v. Fairmount Glass Works*, 59 Fed. (2nd) 539.

STATEMENT.

The trial court's charge upon the question of damages, of which complaint is now made, was as follows:

> "In the event you find that the Defendant did break its contract with the Plaintiffs—in the event you find that the Defendant did enter into a contract with the Plaintiffs as the undisclosed principals of the W. E. Deegans Coal Company, and the Plaintiffs are entitled to recover, then it would be your duty to fix the amount of the damages. And the measure of damages in this case, in the event you find for the Plaintiffs, will be the value of the amount of coal which

the Defendant refused to take and which the Plaintiffs were ready, willing and able to deliver during the life of the contract, at the price fixed in the contract at the time of the breach, less the market price—that is, the difference between the contract price, as fixed by the contract, and the fair market price of that amount of coal which the defendant should have taken under its contract, and which it did not take.

"That is not stating it very clearly, but I hope I convey to you just what I mean. If you find that the Defendant broke its contract and did not take the coal that it should have taken from the Plaintiffs, at that time the Plaintiffs would be entitled to recover—if you find the Plaintiffs are entitled to recover—the difference between the value of that coal and the market price of such coal—its fair market value, and the contract price, plus six per cent interest."

(R. p. 121.)

Respondents' brief (p. 3) omits to state that the only attempt to except to this portion of the charge was made *after the retirement of the jury*, as follows:

"The Court: Swear the Bailiff.

"(The Bailiff was sworn.)

"The Court: Gentlemen, you may retire with the Bailiff.

"(Whereupon, the Jury retired to consider its verdict.)

"Mr. Hall: My attention has been called to this, your Honor—and that is the charge of the

Court as to the measure of damages would be the difference between the contract price and the market price at the time of the breach.

"Mr. Noel: Your Honor, an exception must be taken while the Jury is present, and the Jury has already retired. We object to this.

"The Court: Let it be shown that the Jury has retired in the custody of the Bailiff, and after the retirement of the Jury the attorney, Mr. Hall—

"Mr. Hall: But before they reached their room.

"The Court: Well, I don't know whether they have reached their room, or not.

"Mr. Hall: Well, let us state the time—within two minutes after the Jury left the jury-box. May I put that within two minutes after the Jury has retired?

"The Court: Yes.

"Mr. Hall: Counsel made this further exception and asked that the Jury be recalled and proper action taken, to-wit, that the Plaintiffs except to so much of the charge of the Court as states that the measure of damages is the difference between the contract price and the market price at the time of breach.

"The Court: Isn't that the rule?

"Mr. Hall: No, your Honor. It is the contention of counsel for Plaintiffs that the measure of damages is the difference between the contract price and the market price at the time specified in the contract for delivery. I don't believe the Court was right in that instruction which it gave.

"The Court: Supposing you didn't deliver the coal when you should have delivered it, but you tendered it six months later?

"Mr. Hall: Well, that is something else.

"The Court: Well, that is what you asked for—at the time of delivery.

"Mr. Hall: No, at the time called for in the contract for delivery.

"The Court: Well, the jury has retired. We will take a short recess."

(R. pp. 122-123.)

At the conclusion of the charge the court queried:

"Are there any exceptions or requests?"

To this counsel for respondents replied as follows:

"Mr. Hall: No exceptions, your Honor, but I suppose we get the benefit of the written requests which we passed up to the court."

Counsel then attempted to except to the court's supposed refusal to charge, in the following language:

"The Plaintiffs except to the refusal of the Court to grant the instructions in accordance with Plaintiffs' requests, numbered 1 to 11, both inclusive, and I suppose we will get the benefit of that exception separately, without going through them separately.

* * * * * *

"Mr. Hall: The Plaintiffs except to the refusal of the Court to charge as requested in requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11."

(R. p. 122.)

SUMMARY OF ARGUMENT.

I.

Respondents' second proposition (Brief p. 4), to the effect that the order refusing a new trial was reviewable, is not supported by the cases cited.

II.

The trial court's charge as to damages, of which complaint is now made, even if not strictly accurate in point of law, is not reviewable because the alleged error was not called to the attention of the trial court and no exception was taken until after the Jury had left the bar.

III.

No question is raised by the exceptions to the court's refusal of respondents' requests to charge, or by the assignment of error based thereon (R. pp. 133-138), except the correctness of the request as a whole. It requires only inspection and no argument to demonstrate that nearly all of it should not have been given.

ARGUMENT.

I.

Respondents' second proposition (Brief, p. 4) to the effect that the order refusing a new trial was reviewable, is not supported by the cases cited.

Extended discussion of these cases is unnecessary. Suffice it to say that *Wabash Railway Co. v. McDaniels*, 107 U. S. 454; *Insurance Company v. Folsom*, 18 Wall. 237; *St. Louis & I. M. R. Co. v. Craft*, 237 U. S. 648; *Metropolitan Railroad Co. v. Moore*, 121 U. S. 558, and *Railroad Co. v. Fraloff*, 100 U. S. 24, cited by respondents for this proposition, hold exactly the opposite and might all have been cited, as one of them was, in support of the petition for certiorari. The remaining cases from this court require no discussion, and the cases from Circuit Courts of Appeals have already been discussed in petitioner's original brief accompanying the petition for certiorari.

II.

The trial court's charge as to damages, of which complaint is now made, even if not strictly accurate in point of law, is not reviewable because the alleged error was not called to the attention of the trial court and no exception was taken until after the jury had left the bar.

The manner in which exception was sought to be taken to the court's charge as to damages is set out in our statement (*ante*, pp. 3-4).

Paragraph 1 of Rule 8 of the rules of this court provides:

> "No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions."

The extreme antiquity of the above rule, dating from the statute of Westminster 2d, might fairly be said to make it an essential part of trial by jury. The origin of the practice and the reason behind it is stated in *Phelps v. Mayer*, (1853) 15 Howard, 160, as follows:

> "It has been repeatedly decided, by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster 2d, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge if requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It

need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken.

"Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time."

It is also clearly expressed in *Pacific Express Co. v. Malin*, (1889) 132 U. S. 531.

In view of this rule, it is thought unnecessary to discuss the abstract correctness of the instruction. However, it may be pointed out that it was, at worst, merely obscure and is not definitely susceptible of the construction which counsel for the respondents place upon it.

III.

No question is raised by the exceptions to the court's refusal of respondents' requests to charge, or by the assignment of error based thereon (R., pp. 133-138), except the correctness of the request as a whole. It requires only inspection and no argument to demonstrate that nearly all of it should not have been given.

Reference is made to respondents' requested instructions and exceptions thereto merely because the argument on the facts found in respondents' latest brief, at pages 13 to 17, can have no purpose except as a basis for asserting some error of law committed by the court in charging the jury with respect thereto. The incorrect inference which respondents seek to draw from these facts has already been pointed out in our reply brief on certiorari on page 4. Moreover, the record shows no request for instruction upon any of this subject matter, except twelve instructions which were requested in gross, and to the refusal of which the only exception was an exception in gross. Consequently no ruling of law upon these facts was properly requested of the trial court, or properly excepted to.

The "Francis Wright," (1881) 105 U. S. 381;
Bogk v. Gassert, (1893) 149 U. S. 17.

CONCLUSION.

It is submitted that no question of law presented by this record was even fairly debatable. The present case has been three times tried. Two prior jury verdicts have been in petitioner's favor. Two prior actions on the same contract were dismissed before final judgment. (R. pp. 100-108.)

It is respectfully suggested that this apparently interminable litigation should end by an affirmance of the last judgment of the district court.

HENRY H. HORNBROOK,
PAUL Y. DAVIS,
Attorneys for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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BRIEF FOR RESPONDENTS

O'CONNOR HALL,

Attorney for Respondents.

C. W. NICHOLS,

O. J. DEEGAN,

Of Counsel.

I.

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CONNOR HALL,

Attorney for Respondents.

C. W. NICHOLS,

O. J. DEEGAN,

Of Counsel.

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ADDITIONAL STATEMENT 1

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ARGUMENT 3-8

I. The petition for certiorari is based upon the proposition that the Court below re-examined facts found by a jury. The answer to this is, that the jury did not find, but ignored, the facts in that where the undisputed and uncontradicted evidence showed large and substantial damages it returned nominal damages of only One Dollar, and the refusal of the District Court to set aside this verdict was not a decision upon a question of fact but of law and reviewable by the Circuit Court of Appeals 3-7

II. The petitioner entirely lacks any substantial or meritorious defense to the action of the respondents for the record shows and as the Circuit Court of Appeals found petitioner breached the contract wholly without justification 7-8

III. The granting of ceritorari by this Court would only further delay the justice due respondents now already delayed more than nine years by pleas and pretexts of petitioner found to be without substance or merit..... 8

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U. S. vs. Routt County Coal Co., 248 Fed. 483 7

ADDITIONAL STATEMENT

In addition to the facts set out in the petition and brief for the petitioner, Fairmount Glass Works, it is pertinent to call attention to the following:

The Circuit Court of Appeals in its opinion (Page 154) reached the conclusion that the undisputed evidence showed the respondents to be entitled to more than $18,000.00 after allowing to the petitioner all that it could possibly recover upon its counter-claim. In reaching this conclusion, the Circuit Court of Appeals computed the damages in both instances upon that basis most favorable to petitioner, that is, in computing the damages to which the undisputed evidence showed the respondents to be entitled the court took the difference between the contract price and the highest market price for each particular month, thus minimizing to the lowest limit set by any witness the damages recoverable by the respondents; and on the other hand when the Court came to compute the damages recoverable by the petitioner upon its counter-claim it took the difference between the contract price and the lowest market price, thus allowing the maximum to the petitioner according to the evidence of the witness that fixed the lowest market price. The Court reached the conclusion that accepting as true the contentions of the petitioner and reducing to the lowest limit fixed by any witness the claims of the respondents the latter were entitled to recover a substantial sum, and not the One Dollar fixed by the jury.

The only issue of fact which the petitioner now apparently claims should have been submitted to the jury was that of misrepresentation. This misrepresentation (Paragraph 4 Answer, pages 15 and 16; testimony of

John Rau, President of Petitioner Page 73) consisted in the claim that W. E. Deegans and I. F. Vass, at Huntington, West Virginia, on the 19th day of July, 1920, at the time the contract was entered into, stated that the Agent in whose name the contract was made, the W E. Deegans Coal Company, was the owner of the mines, whereas, in fact, they were owned by respondents. It was the claim of the respondents in the District Court, and in the Circuit Court of Appeals, that such statement was clearly shown by the documentary evidence furnished by the petitioner itself not to have been an inducing motive for the contract, for the reason that the petitioner had already determined to enter into the contract (the terms of which had been made known) before the 19th day of July, 1920, and before the agent of the petitioner ever went to Huntington, West Virginia. Exhibit 1, page 78; Exhibit 2, page 78; Exhibit 3, page 79; Exhibit G, page 65; Exhibit 7, page 81; Exhibit 8, page 65; Exhibit 8, page 82. The conclusion that the respondents would draw from this was that the District Court should have directed a verdict for the respondents.

The present litigation has lasted nine years and there have been three trials of the present case. 19 Fed. (2nd) 273; 33 Fed. (2nd) 420; 280 U. S. 601. (Record, page 43).

SUMMARY OF ARGUMENT

I

The petition for certiorari is based upon the proposition that the Court below re-examined facts found by a jury. The answer to this is, that the jury did not find but ignored, the facts in that, where the undisputed and un-

contradicted evidence showed large and substantial damages it returned nominal damages of only One Dollar, and the refusal of the District Court to set aside this verdict was not a decision upon a question of fact but of law and reviewable by the Circuit Court of Appeals.

II

The petitioner entirely lacks any substantial or meritorious defense to the action of the respondents, for as the record shows, and as the Circuit Court of Appeals found, petitioner breached the contract wholly without justification.

III

The granting of certiorari by this Court would only further delay the justice due respondents, now already delayed more than nine years by pleas and pretexts of petitioner found to be without substance or merit.

ARGUMENT

I

The entire position of the petitioner is and must be based upon the proposition that the jury had the right to ignore undisputed and uncontradicted evidence showing damages in excess of $18,000.00, without interest, and to return a verdict for only nominal damages of One Dollar. These damages were based upon matters easily calculable, that is the difference between the contract price and the markt price from month to month of a designated grade of coal. The Circuit Court of Appeals took the lowest measure of damages stated by any witness in calculating

the damages of respondents, and in calculating the damages upon the counter-claim of the petitioner took the highest measure of damages stated by any witness, and reached the conclusion that the respondents were upon any hypothesis entitled to recover more than $18,000.00, not counting intreest. The reversal of the order denying the motion to set aside this verdict was not a re-examination of facts, but a reversal upon a matter of law.

In **James** vs. **Evans,** 149 Fed. 136, 141, it is said that the ruling of the trial court upon the motion for a new trial if based upon an erroneous view of the law, amounts to an abuse of discretion and is reviewable.

In **Pugh** vs. **Bluff City Excursion Co.,** 177 Fed. 399, the Circuit Court of Appeals for the Sixth Circuit reviewed and reversed the refusal of the lower court to grant a new trial where the jury found for the plaintiff and fixed the damages of one dollar for the death of a son twenty-nine years of age and in good health.

In **Stetson** vs. **Stindt,** 279 Fed. 209, it is held by the Circuit of Appeals for the Third Circuit that a finding for the plaintiff, but for only part of the damages shown by uncontroverted evidence, is contrary to the law, and if the trial court refuses to set aside such a verdict its action is reviewable.

In **Glenwood Irrigation Co.,** vs. **Valery,** 248 Fed. 483, it is held by the Circuit Court of Appeals for the eighth circuit that a finding for the plaintiff, but for only part of the damages clearly recoverable, is an error of law, and in the action of the trial court thereon is reviewable.

In **Smith** vs. **United States,** 281 Fed. 696, the Circuit Court of Appeals for the fourth circuit reviewed and reversed the action of the trial court in refusing to grant a new trial.

In **Pugh** vs. **Bluff City Excursion Co.,** cited above, the Circuit Court of Appeals for the sixth circuit said:

"It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages."

In **Stetson** vs. **Stindt,** cited above, the Circuit Court of Appeals for the third circuit said:

"The third is based on the broad proposition of law that a verdict which is contrary to the law of the case or which is not sustained by evidence in the case must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that

a verdict by the jury in disregard of such instructions calls for a new trial, and that, under the circumstances, refusal by the trial court to grant a new trial constitutes reversible error.

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court. That liability might be for more than the jury found; yet it might be for nothing. What his liability is, the jury refused to say; but said something else, which, under the law and on the facts, was simply untrue. Therefore, we are of opinion that the verdict was invalid and that the court erred in entering judgment upon it. Whether this error is reversible depends on the next question.

"The defendants in error make the point that a question of error entering judgment on the verdict, even if invalid, is not before this court because that question was decided with finality by the trial court on the motion for a new trial, resting on the principle, too well established to require authority, that the granting or refusing of a new trial is a matter of discretion by the trial court, with the exercise of which an appellate court will not interfere.

"This rule, invariable in its operation, is by its terms applicable where the discretion of the trial court is invoked with reference to a matter open to its exercise. It was conceded in this case that the verdict was opposed to the court's instruction on the law. Also, there was no question whether the verdict was right or wrong. Admittedly, it was wrong. It did not require exercise of discretion to arrive at this conclusion. Everyone agreed to it. Therefore, the duty of the court not to

enter judgment upon a verdict unlawful because rendered in opposition to its instruction was one of law. **United States vs. Routt County Coal Co.,** 248 Fed. 483, 485. In the performance of that duty the learned trial judge was not called upon to determine a question with respect to which no strict rule of law is applicable, but he was called upon to enforce a fixed rule. His duty was quite imperative. Nor did the learned trial judge, in entering judgment on the verdict in this case, do so within a discretion which he brought into exercise. What he did was to interpret the law and thereupon to perform the duty of applying the law as he had interpreted it. As we have been constrained to find error in his interpretation of the law, it follows necessarily that error was involved in its application."

II

As found by the Circuit Court of Appeals (Record, Page 153), the petitioner committed a breach of its contract wholly without justification, and apparently it now claims that the only issue which should have been submitted to the jury was that of misrepresentation: that is, that it was represented that the agent, The W. E. Deegans Coal Company, was the owner o the mines when, in fact, the respondents were the owners (Pages 15, 16, 73). This representation was said to have been made at Huntington, West irginia, on the 19th day of July, 1920. A cursory examination of the record (Exhibit 1, page 78; Exhibit 2, page 78; Exhibit 3, page 79; Exhibit G, page 65; Exhibit 7, page 81; Exhibit 8, page 65; Exhibit 8, page 82) shows that such representation was never any inducing motive to the formation of the contract; for the petitioner had already determined to enter into the contract (the terms of which were known) before the President of petitioner ever came to Huntington. The pertinency of this matter here upon the present application is to show that the claim of the petitioner is wholly without merit, unsubstantial, and that its consistent course has

been to endeavor to avoid liability for its unjustifiable breach of contract in December, 1920.

III

Another matter not improper for the consideration of this court is, that the petitioner has succeeded in prolonging this litigation for nine years (Record, page 43). The present case has been tried three times; has been three times in the Circuit Court of Appeals, and a second application for a writ of certiorari is now made to this Court. As the record shows, and as the Circuit Court of Appeals found, there was no substantial defense to the claim of respondents. The grant of certiorari by this court would only further prolong a litigation which has now extended over a period of more than nine years.

It is, therefore, respectfully submitted that the writ of certiorari should be denied.

CONNOR HALL,
Attorney for Respondents.

C. W. NICHOLS
O. J. DEEGAN,
Of Counsel.

CUBI POINT COAL COMPANY and
PARAGON COLLIERY COMPANY
Respondents

BRIEF FOR RESPONDENTS

CONNOR HALL, Esq.
Counsel for Respondents

C W Nicholls

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 314

FAIRMONT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY and
PARAGON COLLIERY COMPANY,
Respondents.

BRIEF FOR RESPONDENTS

CONNOR HALL, Esq.,
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BRIEF FOR RESPONDENTS

STATEMENT

In the trial in the District Court the jury found a verdict for the plaintiff upon breach of contract for the sale and delivery of coal and assessed the damages at one dollar. The evidence as to the amount of the undelivered coal and the market price at the times fixed in the contract for delivery was uncontradicted. The Circuit Court of Appeals, in its opinion, said: "Appellee breached its contract without justification on December 4, 1920. The market price of coal is shown for

each day of the month, and the average price per month is also disclosed, so that the actual amount of damage is quite definitely ascertainable. There is a slight discrepancy in the statements of witnesses who testified as to the market value of the coal. One witness, for example, placed the value of such coal in April at $2.60 to $2.70, whereas another witness placed it at $2.75 and another placed it at $2.90. This was the widest difference of opinion appearing in the entire record. There is also a difference in the testimony respecting the amount shipped and the amount received. This diffrence was due apparently to the fact that the railroads confiscated a small amount of the coal on several occasions.

"Against appellants' damages, appellee sought to recover its alleged damages for appellants' failure to deliver the tonnage specified for the months of July, August and October. The market value for coal for these months is likewise not in serious dispute. The contract called for the delivery of a total of 7,000 tons during the first five months. 6,638.95 were shipped.

"It is evident that on any hypothesis appellants were entitled to recover over $18,000. The jury fixed the damages at $1. The verdict should have been set aside and a new trial ordered on appellants' motion.

"United Press Assn. v. Nat. Newspapers Assn., 254 Fed. 284;
Pugh v. Bluff City Excursion Co., 177 Fed. 399;
Stetson v. Stindt, 279 Fed. 209;
James v. Evans, 149 Fed. 136;
Glenwood Irrigation Co. v. Vallery, 248 Fed. 483;

Smith v. United States, 281 Fed. 696."

The District Judge charged the jury (page 121) that the measure of damages was the difference between the contract price and the market price at the time of breach. Counsel for the respondents (pages 122, 123) called his attention to the error in the charge and requested that he instruct the jury that the measure of damages was the difference between the contract price and the market price, not at the time of breach as he charged, but at the times fixed in the contract for delivery. The colloquy between the court and counsel will be found as indicated on pages 121, 122 and 123. The breach as shown by the evidence and found by the Circiut Court of Appeals occurred on December 4, 1920. The coal which remained undelivered under the contract was to be delivered in equal monthly installments in the month of December, 1920, and in the first six months of the year 1921. The difference between the market price and the contract price (page 42) in December was ($.75) seventy-five cents—in January ($2.35) two dollars thirty-five cents—in February ($3.00) three dollars and in each of the months of April, May and June ($3.75) three dollars seventy-five cents.

PROPOSITIONS OF RESPONDENTS

I. **The judgment of the Circuit Court of Appeals reversing the judgment of the District Court is right without regard to any question as to whether the order denying a new trial is appealable;** for,

(A) the judgment appealed from may be sup-

ported upon grounds not considered and reasons not assigned by the Circuit Court of Appeals. **Langnes v. Green,** 282 U. S. 531, 538; **Story Parchment Co. v. Paterson Co.,** 282 U. S. 555, 560; and

(B) the charge of the District Court was plainly erroneous in instructing that the measure of damages was the difference between the contract price and the market price at time of breach instead of (as is the correct rule) the time of delivery. **U. S. v. Burton Coal Co.** 273 U. S. 337, 340. This error was a natural and material inducement to the mistake of the jury in finding damages of only one dollar.

II. But the order refusing a new trial was appealable. There was not involved any re-examination of facts, but merely a review of a matter of law. The finding of one dollar damages was arbitrary, not supported by evidence, but contrary to all the uncontradicted evidence of disinterested witnesses; and the setting aside of such verdict is not a matter of discretion but of law. **Mills v. Scott,** 9 Otto 25, 30; **Railroad Co. v. Frailoff,** 100 U. S. 24, 31, 32; **Wabash Railway Co. v. McDaniels,** 107 U. S. 454, 456, 463; **Insurance Company v. Folsom,** 18 Wall, 237, 252; **St. Louis & Iron Mountain Railway Company v. Craft,** 237 U. S. 648, 661; **Pleasants v. Fant,** 22 Wall 116, 120, 121; **Metropolitan Railroad Co. v. Moore,** 121 U. S. 558, 567, 568; **Louisville, etc. Railroad Co. v. Woodson,** 134 U. S. 614, 623; **Walker v. Southern Pacific R. R.,** 165 U. S. 593; 596; **Atcheson, etc., R. R. Co. v. U. S.** 284 U. S. 248, 262; **James V. Evans, 149 Fed.,** 136, 141;

Pugh v. Bluff City Excursion Co., 177 Fed. 399; **Stetson v. Stindt,** 279 Fed. 209; **Glenwood Irrigation Co. v. Vallery,** 248 Fed. 483; **Smith v. U. S.** 281 Fed. 696.

III. **The judgment of the District Court being subject to reversal, the Circuit Court of Appeals in limiting the new trial to damages followed the practice sanctioned by this court. Gasoline Products Co. v. Champlin Refining Co.,** 283 U. S. 494.

ARGUMENT

Counsel for petitioner base their case upon the ground that the order of the District Court denying a new trial is not appealable, and that therefore the Circuit Court of Appeals in finding this to be error exceeded its power. We will discuss this question later. The judgment of the Circuit Court of Appeals is to be supported without any necessary consideration of this question. The jury, as we have seen, found for the respondents, (plaintiffs in the District Court), but assessed damages for only one dollar. Such mistake was doubtless induced by the erroneous charge of the court. In **Langnes v. Green,** 282 U. S. 531, 538, this court said, "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, quite apart from the fact that this is a proceeding in admiralty." Likewise in **Story Parchment Co. v. Paterson Co.,** 282 U. S. 555, 560, it was said, "Respondents seek to sustain this judgment upon that ground and also upon the additional ground, which the lower court found against them,

that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross-petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do."

The District Court, as we have seen (pages 121, 122, 123) charged that the measure of damages for the breach by the defendant for the contract to take coal was the difference between the contract price and the market price at the time of breach. The correct rule as laid down by this Court is, of course, the difference between the contract price and the market price not, as charged by the Court, at the time of the breach, but at the time fixed in the contract for delivery. In **U. S. v. Burton Coal Co.,** 273 U. S. 337, 340, the Court said, "The coal had a market value and it was less than the contract price. The applicable measure of damages is fixed by the rule of law that, where a buyer in violation of an executory contract of sale refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the times when and the places where deliveries should have been made." This was not only a very plain, but also a prejudicial error. The breach occurred on December 4, 1920. The times fixed for delivery were the month of December, 1920, and the first six months in the year 1921, in equal monthly installments. Now, the difference between the contract price and the market price in December, the time of the breach, was ($.75) seventy-five cents. The difference in the subsequent months in which delivery was to be made was as fol-

lows: January ($2.35) two dollars thirty-five cents; February ($3.00) three dollars; March ($3.50) three dollars fifty cents, and for each of the months of April, May and June, ($3.75) three dollars seventy-five cents (page 42). For this reason alone the judgment of the District Court was liable to reversal, and can in no event be affirmed; but on the contrary the judgment of the Circuit Court of Appeals for this reason, if for no other, is to be supported.

But the order of the District Court denying a new trial was not the exercise of such discretion as to be beyond review by the Circuit Court of Appeals. There was not involved any re-examination of facts. The verdict of the jury finding only one dollar damages was not only unsupported by evidence, but was contrary to the whole of the evidence introduced upon this point, uncontradicted evidence of disinterested witnesses. The only witnesses testifying as to the market price of the coal were I. F. Vass (page 42), M. L. Burtless (page 51), Walter L. Tetman (page 50) and Milton M. Tyree (page 52). The Circuit Court of Appeals in its opinion took the highest market price stated by any of these witnesses, found the difference between that and the market price and from this deducted upon the counterclaim of the defendant its damages calculated upon the lowest market price, thus giving to the petitioner the benefit of all differences and of all doubts. The result showed damages to the respondents in excess of $18,000.00 without counting interest. It is thus seen that the finding of damages of only one dollar was plainly arbitrary. Only one of these witnesses, Mr. Vass, had any interest in the case.

The question whether an order denying a new trial is reviewable may properly be divided into two parts: first, that of constitutional power and secondly as a mere rule of practice.

Now, as far as constitutional power is concerned, there is little difficulty. The constitution merely forbids a re-examination of facts found by a jury otherwise than according to the course of the common law. So far as constitutional power is concerned, that merely means that the right of trial by jury shall be preserved. But this does not mean that a jury must decide a case unless there be evidence to support it. It has, of course, long been settled that the Court is not obliged to submit every case to a jury even though there be a scintilla of evidence. If there be no substantial evidence to support the plaintiff's action or the defendant's defense, the duty of the Court is to instruct the jury to return a verdict in accordance with the court's opinion. This demonstrates that the seventh amendment does not give any right to an abritrary, unbridled decision by a jury. In fact, under our system of government, there is no place for an arbitrary finding even by administrative bodies in which the largest discretion is reposed. Thus, in **Atcheson, etc. v. U. S.**, 284, U. S. 248, 262, this court said, "We think that this action was not within the permitted range of the commission's discretion, but was a denial of right."

So far as the ordinary rule against reviewing an order denying a new trial is a rule of practice, there is at bottom equally little difficulty. Rules of practice in the Federal Courts are not straight-jackets—they are not masters, but servants and guides. Generally it is

entirely proper that an order granting or denying a new trial should not be reviewable, for ordinarily a party has other opportunities of preserving his rights. If improper evidence should be admitted, or proper evidence be rejected, if the charge of the Court be erroneous, if there be not sufficient evidence to support an action or a defense, a party may in the course of the trial take his exceptions. This applies to everything occurring up to the time the case is submitted to the jury. But for an arbitrary finding or palpable mistake of the jury in reaching its verdict, a motion for a new trial is all that is left, and if, as here, the mistake is plain and the finding unsupported, the setting aside of such verdict is not a matter of discretion. A party has the right to have his case decided not by caprice, but according to the law of the land, and if he is deprived of such right and has no opportunity to make his objection except by a motion for a new trial, and that be denied, he should then have the judgment of an Appellate Court.

In **James v. Evans,** 149 Fed. 136, 141, it is said that the ruling of the trial court upon the motion for a new trial if based upon an erroneous view of the law, amounts to an abuse of discretion and is reviewable.

In **Pugh v. Bluff City Excursion Co.** 177 Fed. 399, the Circuit Court of Appeals for the Sixth Circuit reviewed and reversed the refusal of the lower court to grant a new trial where the jury found for the plaintiff and fixed the damages of one dollar for the death of a son twenty-nine years of age and in good health.

In **Stetson v. Stindt,** 279 Fed. 209, it is held by the Circuit Court of Appeals for the Third Circuit that a

finding for the plaintiff, but for only part of the damages shown by uncontroverted evidence, is contrary to the law, and if the trial court refuses to set aside such a verdict its action is reviewable.

In **Glenwood Irrigation Co. v. Valery,** 248 Fed. 483, it is held by the Circuit Court of Appeals for the Eighth Circuit that a finding for the plaintiff, but for only part of the damages clearly recoverable, is an error of law, and the action of the trial court thereon is reviewable.

In **Smith v. United States,** 281 Fed. 696, the Circuit Court of Appeals for the Fourth Circuit reviewed and reversed the action of the trial court in refusing to grant a new trial.

In **Pugh v. Bluff City Excursion Co.** cited above, the Circuit Court of Appeals for the Sixth Circuit said:

"It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of

having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages."

In **Stetson v. Stindt,** cited above, the Circuit Court of Appeals for the Third Circuit said:

"The third is based on the broad proposition of law that a verdict which is contrary to the law of the case or which is not sustained by evidence in the case must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that a verdict by the jury in disregard of such instructions calls for a new trial, and that, under the circumstances, refusal by the trial court to grant a new trial constitutes reversible error.

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court. That liability might be for more than the jury found; yet it might be for nothing. What his liability is, the jury refused to say; but said something else, which, under the law and on the facts, was simply untrue. Therefore,

we are of opinion that the verdict was invalid and that the court erred in entering judgment upon it. Whether this error is reversible depends on the next question.

"The defendants in error make the point that a question of error entering judgment on the verdict, even if invalid, is not before this court because that question was decided with finality by the trial court on the motion for a new trial, resting on the principle, too well established to require authority, that the granting or refusing of a new trial is a matter of discretion by the trial court, with the exercise of which an appellate court will not interfere.

"This rule, invariable in its operation, is by its terms applicable where the dicretion of the trial court is invoked with reference to a matter open to its exercise. It was conceded in this case that the verdict was opposed to the court's instruction on the law. Also, there was no question whether the verdict was right or wrong. Admittedly, it was wrong. It did not require exercise of discretion to arrive at this conclusion. Everyone agreed to it. Therefore, the duty of the court not to enter judgment upon a verdict unlawful because rendered in opposition to its instruction was one of law. **United States v. Routt County Coal Co.**, 248 Fed. 483, 485, C. C. A. 495. In the performance of that duty the learned trial judge was not called upon to determine a question with respect to which no strict rule of law is applicable, but he was called upon to enforce a fixed rule. His duty was quite imperative. Nor did the learned trial judge, in entering judgment on the verdict in this case, do so within a discretion which he brought into exercise. What he did was to interpret

the law and thereupon to perform the duty of applying the law as he had interpreted it. As we have been constrained to find error in his interpretation of the law, it follows necessarily that error was involved in its application."

It thus appearing that the judgment of the District Court being subject to reversal for both of the reasons assigned above, the Circuit Court of Appeals acted properly in limiting the new trial to damages alone. **Gasoline Products Co. v. Champlin Co.** 283 U. S 494. It was especially proper here. The jury had found the issues in favor of plaintiff, but assessed damages at only one dollar. This mistake, as we have seen, was induced by the erroneous charge of the court upon the measure of damages.

In fact, the defendant had no substantial defense to the action of the plaintiffs. That it had committed a breach of the contract was determined upon prior appeal, 33 Fed. (2nd) 420. The only defense that it could claim should have been submitted to the jury, upon the trial now under consideration was that the W. E. Deegans Coal Company represented that it was the owner of the mines, whereas in fact they were owned by the respondents. The W. E. Deegans Coal Company was the sales organization of the respondents. W. E. Deegans owned a majority of the stock of all three companies (page 58), and he, together with his partner, J. B. Hoffmeier, Mrs. W. E. Deegans, Jack Faulkner and O. C. Huffman, owned substantially all the stock of all three companies. (Pages 40, 41, 46, 54 and 58.)

The undisputed written correspondence shows that

the defendant had prior to the date of the alleged misrepresentation fully determined to enter into the contract and that the alleged misrepresentations, as a matter of law, did not induce the defendant to do anything which it would not otherwise have done.

The defendant had had a contract with the plaintiffs for the furnishing of coal for the year previous. This contract was to expire in July, 1920. On July 7, 1920, (page 78) the defendant Glass Works through John Rau, its president, wrote the W. E. Deegans Coal Company at Huntington, calling attention to the fact that he had a few days previously written: "In reference to a contract for our next year's coal supply on the same kind of coal that we have been getting this year." He asks the Deegans Company to name a price and continues: "We are very anxious to know as soon as possible just what you intend to do for us on next year's coal supply. We will have to know as soon as possible and the best price." On July 10 (page 78) the W. E. Deegans Coal Company answered this letter saying that Mr. Deegans who had charge of the operating companies, was out of the city, but would return and that Mr. Rau would be advised. On the 12th (page 79), The Glass Works through its president, again wrote urging that he be given some word as soon as possible, among other things saying: "We would like to know as soon as possible what you intend to do about furnishing us with coal for next season. We are needing coal badly and must have this information promptly. If we are not going to get coal from your company, we must get coal elsewhere, and we hope you will give us an answer as soon as possible." On July 14 (page 80) the W. E.

Deegans Coal Company sent a telegram to the defendants as follows: "Will contract your requirements egg coal at six fifty net ton mines subject condition in letter today." In a letter of the same date (page 80) the conditions referred to are stated, that Mr. Deegans has been negotiating for the sale of the property and that if he did sell it, then any contract must be subject to such sale. On July 15, the next day the defendant wrote as follows:

"We have your telegram reading as follows: 'Will contract your requirements egg coal at $6.50 net ton mines, subject conditions in letter today.'

"We note you say you are forwarding contract and price will be $6.50 net at the mines, subject to conditions in letter of same date.

"We would like to have you ship us our full amount of coal right along, also the balance of cars which are still due us on the old contract. Please let this coal come along as soon as possible, also your contract.

Yours truly,
FAIRMONT GLASS WORKS
Per John Rau, President."

On the next day, July 16 (page 81) before he had received any reply, he writes again:

"We would like for you to ship our coal at the same amount per month as we have been ordering according to our old contract, and as advised in telegram today. I will be there Monday, the 19th, and would

like to meet your Mr. Deegans and close up the deal.

"We are sorry to hear that the contract will have to be cancelled in case the company is sold. Certainly we will have to take our chances on this, but we would like to have at least sixty days leeway in case the company was sold, as we are paying a good price for coal and the party who buys your company should surely be willing to carry us along at least sixty days to give us a chance to get coal elsewhere."

From the above it will be seen that on the 15th of July after he had received the price and the new condition which was to be added to the contract (a form of which he already had and with which he was familiar) Mr. Rau writes:

"Please let this coal come along as soon as possible, also your contract," and on the next day, July 16, he says he will be there Monday 19th and "would like to meet your Mr. Deegans and close up the deal." He did go to Huntington on the 19th and closed up the contract as he anticipated. The above correspondence shows that Rau was very anxious to obtain a contract with the plaintiffs and that he had fully made up his mind to enter into it before he ever left Indianapolis, that is on the 15th and 16th of July. According to his own testimony and the only testimony as to the misrepresentation that the Deegans Company owned the mines was made on the 19th after he came to Huntington. If it were ever made, it had no part in inducing him to enter into the contract, for he had previously determined to contract with the W. E. Deegans Coal Company and was in fact very anxious and the disturbance

in Mr. Rau's mind was whether the Deegans Coal Company would give him a contract. So far from the Coal Company inducing Mr. Rau or attempting to induce him to do anything, he was all the time anxiously and persistently pursuing them beseeching a contract. He made the advances all the way. This evidence is furnished by his own written letters and conclusively shows that the alleged representations were not any inducement, even if they were made. Therefore, there was no substantial issue upon misrepresenation to be submitted to the jury.

In **Southern Development Co. v. Silva,** 125 U. S. 249, 250, the court said: "The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof . . . . Fifthly, that it was acted on by complainant to his damage." This is of course the general rule. **Schugan v. Scott,** 162 F. 209 (CCA8); **Brandon v. McCausland,** 171 F. 402, (CCA8). And where a party fails to prove that he would have acted otherwise had he known the facts he can not have any relief upon the ground of fraud. In **Ming v. Woolfolk,** 116 U. S. 599, 602, 603, the court said: "So far, therefore, as the case made by the declaration is to be considered as an action to recover damages for a deceit practiced by the defendant, it amounts to this, that the defendant, by his false representations, induced the plaintiffs to do something which they would have done anyhow, and by which they sustained no loss, but on the contrary

were greatly advantaged. 'The requisites to sustain an action for deceit,' says Baron Parke, in **Watson v. Poulson,** 15 Jurist, 1111, are 'The telling of an untruth, knowing it to be an untruth with intent to induce a man to alter his condition and his altering his condition in consequence, whereby he sustains damage'."

It is true that Mr. Rau says that when he took the contract for the year previous, he stated to the representative that he would not contract with a broker or owners; and that the man said: "We own the mines." owners; and hat the man said: "We own the mines." This representation that "we own the mines" cannot be made the basis of any charge of fraud. The Cub Fork Coal Company and the Paragon Coal Company owned the mines and at that time there was in existence the two written contracts constituting the W. E. Deegans Coal Company the exclusive sales agent of the owners (page 109-110). The language of these contracts is: "The seller hereby constitutes and appoints the W. E. Deegans Coal Company its sole agent to sell and agrees to ship to or on orders of the agent the entire output of its mines . . . . " The W. E. Deegans Coal Company was thus authorized to enter into contract binding on the two principals, and its representative was equally the representative of the two mine owners. The Fairmont Glass Works even as a technical matter thereby obtained a contract with the mine owners, and could have sued them thereon. **Darrow v. Horne Produce Co.** 57 F. 463; **Moore v. Sun P. and P. Co.** 101 F. 591, 183, U. S. 642; **Curtis v. Miller** 73 W. Va. 481, 1 Minor Inst. 236; **Johnson v. Hoover,** 72 Ind. 397. Fraud is dishonesty, and certainly no charge of dishonesty can be based upon this statement. Furthermore, we find

that whenever Mr. Vass who conducted the correspondence for the W. E. Deegans Coal Company had occasion to refer to the separate ownership, he did so frankly and without any thought that there was anything to conceal. Thus, in his letter of July 10, he states that Mr. Deegans "who has charge of the operating companies" is out of town and in the letter of November 1, he states that he has taken up the question of increase with the "mine" and they have agreed to waive it.

No charge of fraud can be based upon this statement that "We own the mines," and the claim of the defendant must come back to the alleged statement of July 19 that the W. E. Deegans Coal Company owned the mines. The defendant does not claim that this statement was ever made at any other time or place. The representative in taking the first contract did not state that the W. E. Deegans Company owned the mines, even according to the testimony of Mr. Rau, but simply that "We own the mines," which was technically and substantially true.

The defendant with knowledge that the W. E. Deegans Coal Company was not the owner of the mines (having such knowledge both before and after the signing of the contract) elected to proceed and waived the misrepresentation, if any. A second answer to the alleged misrepresentation of the ownership of the mines is found in the fact that the defendant with full knowledge elected to proceed.

In the letter of November 1, 1920, it was said: "We have taken the matter of increase in cost up with the mine and they have agreed to waive the privilege ac-

corded them in clause 'D' and make no advance on this as a result of the wage increase effective September 1."

This letter was written by the W. E. Deegans Coal Company to the defendant which thereafter called for further shipments. Upon this, the present trial, the plaintiffs introduced new and important evidence in addition to the letter of November 1, upon which the court then passed, which new evidence together with the old, in our opinion leaves this question no longer open. In the letter of July 10, 1920, (page 78) from the W. E. Deegans Coal Company to the defendant written in reply to the defendant's letter of July 7, it is said: "Mr. Deegans **who has charge of the operating companies,** is out of the city at the present, but will return tomorrow and we will advise you Monday . . . . " Mr. Rau was then dealing with the W. E. Deegans Coal Company, which to his knowledge, sold coal. Here he is advised that the operating companies are different. "Operating companies" in this connection, could have meant nothing except something in contra-distinction to the selling company; that is, a mining company. This is the natural meaning of the word and the circumstances at the time but emphasized it. This information in no way shocked the president of the defendant; nor, can it be claimed that he overlooked it, for he says in the letter of July 12 (page 79): "We note that your Mr. Deegans who has charge of the making of contracts is out of the city . . . . " Here Mr. Rau is given information which he reads that there are operating companies different from the company with which he has been dealing and from which he is buying coal; that is, the W. E. Deegans Coal Company. It can hardly be argued he can understand anything other than a mining com-

pany, and in his letter of July 12, he shows that he understands that Mr. Deegans who has charge of the operating companies, must also be consulted about the contracts for he says: "Your Mr. Deegans who has charge of the making of contracts . . . . "

In **Simon v. Goodyear Metalic Rubber Shoe Co.** 105 F. 573, 581, Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said: "But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered."

The foregoing confirms the propriety of the judgment of the Circuit Court of Appeals in limiting the new trial to damages. The written correspondence furnished by the defendant itself shows that its only defense, that of misrepresentation, was untenable: First, because the alleged misrepresentation was not any inducement to entering into the contract, and secondly, that with full knowledge defendant elected to proceed and to call for continued performance of the contract; and thereby waived the fraud—if any.

There was, therefore, nothing substantial in the way of defense to be submitted to the jury except a counter-claim, and this the Circuit Court of Appeals has left open. Be that as it may, however, the jury by its finding for the plaintiff negatived the alleged defenses. It is therefore respectfully submitted that the

judgment of the Circuit Court of Appeals should be affirmed.

O. J. DEEGAN.
CONNOR HALL.

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SUPREME COURT OF THE UNITED STATES.

No. 314.—October Term, 1932.

Fairmount Glass Works, Petitioner,
vs.
Cub Fork Coal Company, et al.

On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 9, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

Cub Fork Coal Company and Paragon Colliery Company brought this action in the federal court for southern Indiana to recover from Fairmount Glass Works $32,417, with interest, as damages for breach of a contract to purchase 17,500 tons of coal, at $6.50 per ton f. o. b. mines, deliverable in twelve monthly instalments beginning June 1920. Jurisdiction of the federal court was invoked on the ground of diversity of citizenship. The Glass Works pleaded in bar several defenses; and it also set up a counterclaim in the sum of $2,000 as damages for failure to make delivery as provided by the contract. Three trials before a jury were had. At each of the first two the verdict was for the defendant; and each time the judgment entered thereon was reversed by the Circuit Court of Appeals with a general direction for a new trial, (19 F. (2d) 273; 33 F. (2d) 420). On the third trial the plaintiffs recovered a verdict for $1; and, after further proceedings, judgment was entered thereon with costs.

The plaintiffs appealed to the Circuit Court of Appeals "for the reasons set forth in the assignment of errors". The errors assigned were the failure to give eleven requested instructions. Nine instructions sought related solely to the question of liability. None of the instructions requested and refused related to the measure of damages. But the first asked for a directed verdict for $42,773.50, and the second asked that if a verdict were rendered for the plaintiffs the damages be set at $42,773.50. The charge given was not otherwise excepted to. It had appeared at the trial

that after receiving in instalments about 6,330 tons of coal, the defendant refused, on December 4, 1920, to accept further deliveries; and that there was a continuing serious decline in the market price of coal from that date to the end of the twelve months fixed by the contract for delivery. The defendant had insisted upon the several defenses pleaded in bar as well as upon the counterclaim. After the verdict the defendant was allowed to amend the counterclaim, so as to allege that the market price of coal was $11 a ton at the time plaintiffs failed to make the deliveries therein referred to and that the defendant's damages from such failure were $10,000. The record recites that a motion for a new trial was made by the plaintiffs and overruled, and that the overruling was excepted to; but the grounds of the motion, and of the refusal to grant it, are not stated. The errors assigned do not include any reference to the motion for a new trial; or to the exception which was taken to the allowance of the amendment of the counterclaim after verdict.

The Circuit Court of Appeals deemed it unnecessary to consider the nine instructions relating to liability, since the verdict for the plaintiffs "upon the issues which determined liability was amply sustained by the evidence." Nor did it discuss the two instructions which alone referred to the amount of damages recoverable. But it made an order substantially as follows: If within thirty days the parties shall stipulate that the judgment be modified by substituting for $1 the sum of $18,500 [or other agreed sum] with interest at the rate of five per cent from December 4, 1920 and costs, the judgment as so modified shall be affirmed; otherwise the judgment shall be reversed and a new trial be had "limited only to an ascertainment of appellants' [plaintiffs'] recoverable damages and the amount of appellee's counterclaim, if upon a new trial it appears that appellee is entitled to any recovery or set-off on its counterclaim." 59 F. (2d) 539. As the parties did not stipulate for the modification suggested by the Court of Appeals, it ordered that the judgment be reversed with costs, and that the cause be remanded to the District Court with direction to grant a new trial limited as stated. The defendant petitioned this Court for a writ of certiorari on the ground that the Circuit Court of Appeals, in violation of the Seventh Amendment of the Federal Constitution, re-examined the verdict of the

jury otherwise than according to the rules of the common law and reversed the judgment solely for alleged error of fact in the verdict and for the alleged error of the trial court in overruling a motion for a new trial. Certiorari was granted, 287 U. S. —.

The reasons assigned by the Circuit Court of Appeals for its action were substantially these: It appears that a large sum is recoverable as damages; that the minimum recoverable may be determined with substantial accuracy by computation, for the defendant "breached its contract without justification on December 4, 1920" and "the market price of coal is shown for each day of the month, and the average price per month is also disclosed, so that the actual amount of damages is quite definitely ascertainable" despite "a slight discrepancy in the statements of witnesses". The amount shipped and the amount received are also quite definitely ascertainable, despite a discrepancy "due apparently to the fact that the railroad confiscated a small amount of the coal on several occasions." Computing plaintiffs' damages "upon the basis most favorable to the" defendant, and the defendant's damages on the counterclaim also on the basis most favorable to it, plaintiffs appear clearly to be entitled to $18,250 with interest at the rate of five per cent from December 4, 1920 and costs. As the jury fixed the damages at $1, the verdict should have been set aside and a new trial granted. Since in view of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 the court is "not at liberty to direct judgment for such amount as we believe would fairly represent" plaintiffs' damages, the parties should be given the opportunity of disposing of the case without further litigation by entering into an agreement as to the damages. If the parties do not so agree, a new trial should be granted; limited to the ascertainment of damages, as in *Gasoline Products Co.* v. *Champlin*, 283 U. S. 494.

If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error it was at liberty under its rules to notice the error although not assigned;[1]

[1]Rule 10 (4) of the Circuit Court of Appeals for the Seventh Circuit provides: "The court may notice a plain error not assigned." See Reliable Incubator & Brooder Co. *v.* Stahl, 105 Fed. 663, 668. A similar rule obtains in this Court; and in each of the other Circuit Courts of Appeals except the Eighth. For examples of the application of these Rules, see United States

and the omission from the record of the grounds of the motion would be no obstacle to a review, since the motion was obviously directed to the failure to award substantial damages.[2] But we are of opinion that the action of the District Court was not reversible error.

First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions;[3] and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate.[4] The rule precludes likewise a review of such action by a circuit court of appeals.[5] Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in § 22 that there should be "no reversal in either [circuit or Supreme]

v. Tennessee & C. R. R. Co., 176 U. S. 242, 256; Columbia Heights Realty Co. *v.* Rudolph, 217 U. S. 547, 552; Weems *v.* United States, 217 U. S. 349, 358; Mahler *v.* Eby, 264 U. S. 32, 45; New York Life Ins. Co. *v.* Rankin, 162 Fed. 103, 108. Compare Pierce *v.* United States, 255 U. S. 398, 405-406.

[2]Contrast Reliance Coal & Coke Co. *v.* H. P. Brydon & Bro., 286 Fed. 827, 832, where the moving party was the defendant, against whom the verdict had gone.

[3]See *e. g.*, Henderson *v.* Moore, 5 Cranch. 11, 12; Marine Ins. Co. *v.* Young, 5 Cranch. 187, 191; The "Abbotsford", 98 U. S. 440, 445; Railway Co. *v.* Twombly, 100 U. S. 78, 81. In numerous cases no reference is made, in denying review, to the grounds for the motion. *E. g.*, Barr *v.* Gratz, 4 Wheat. 213, 220; Brown *v.* Clarke, 4 How. 4, 15; Kerr *v.* Clampitt, 95 U. S. 188, 189; Ayers *v.* Watson, 137 U. S. 584, 597; Van Stone *v.* Stillwell & Bierce Mfg. Co., 142 U. S. 128, 134; Holder *v.* United States, 150 U. S. 91, 92; Blitz *v.* United States, 153 U. S. 308, 312; Clune *v.* United States, 159 U. S. 590, 591; Addington *v.* United States, 165 U. S. 184, 185; Pickett *v.* United States, 216 U. S. 456, 461.

[4]Railroad Co. *v.* Fraloff, 100 U. S. 24, 31; Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454, 456; Arkansas Cattle Co. *v.* Mann, 130 U. S. 69, 75; Fitzgerald Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 113; Lincoln *v.* Power, 151 U. S. 436, 438.

[5]Chesapeake & Ohio Ry. Co. *v.* Proffitt, 218 Fed. 23, 28; Ford Motor Co. *v.* Hotel Woodward Co., 271 Fed. 625, 630; Alaska Packers' Ass'n *v.* Gover, 278 Fed. 927, 929; Boston & Maine R. R. Co. *v.* Dutille, 289 Fed. 320, 324; Louisiana Oil Refining Corp. *v.* Reed, 38 F. (2d) 159, 162; Geo. E. Keith Co. *v.* Abrams, 43 F. (2d) 557, 558; Southern Railway Co. *v.* Walters, 47 F. (2d) 3, 7; Grand Trunk W. Ry. Co. *v* Heatlie, 48 F (2d) 759, 761.

court on such writ of error . . . for any error in fact."[6] Sometimes the rule has been rested on that part of the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[7] More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court.[8]

It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part.[9] Compare Judge Learned Hand in *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment. Compare *Harrison* v. *United States*, 7 F. (2d) 259, 262. Under certain circumstances the appellate court may enquire into the action of the trial court

[6]Act of September 24, 1789, c. 20, 1 Stat. 84-85; compare Rev Stat. §1011, 28 U. S. C., § 879. See Marine Ins. Co. *v.* Young, 5 Cranch. 187, 190; and the discussion in 32 Columbia Law Review, pp. 860-869.

[7]See Metropolitan R. R. Co. *v.* Moore, 121 U. S. 558, 573; Williamson *v.* Osenton, 220 Fed. 653, 655.

[8]Zacharie *v.* Franklin, 12 Pet. 151, 163; United States *v.* Hodge, 6 How. 279, 281; Warner *v.* Norton, 20 How. 448, 461; Pomeroy's Lessee *v.* Bank of Indiana, 1 Wall. 592, 597-598; Freeborn *v.* Smith, 2 Wall. 160, 176; Sparrow *v.* Strong, 3 Wall. 97, 105; Ewing *v.* Howard, 7 Wall. 499, 502; Chicago *v.* Green, 9 Wall. 726, 735; Insurance Co. *v.* Barton, 13 Wall. 603, 604; Newcomb *v.* Wood, 97 U. S. 581, 583-584; Railway Co. *v.* Heck, 102 U. S. 120; Springer *v.* United States, 102 U. S. 586, 595; Missouri Pac. Ry. Co. *v.* Chicago & Alton R. R. Co., 132 U. S. 191; Fitzgerald Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 113; Holmgren *v.* United States, 217 U. S. 509, 521.

[9]At early common law in England writ of error and motion for a new trial were mutually exclusive remedies. See 1 Holdsworth, History of English law, p. 226. The motion was addressed to the discretion of the court in banc. 3 Bl. Comm. 392. Review by the Exchequer Chamber of the refusal to grant a new trial was allowed in a limited class of cases by the Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 35, which provided, however, that "where the application for a new trial is upon Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed." Since the Judicature Acts, which abolished proceedings in error in civil cases and substituted an appeal, (see

on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States*, 146 U. S. 140; *Ogden* v. *United States*, 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro*, 78 Fed. 576, 581; *Dwyer* v. *United States*, 170 Fed. 160, 165; *Paine* v. *St Paul Union Stockyards Co.*, 35 F. (2d) 624, 626-628. It becomes necessary, therefore, to determine whether the circumstances of the case at bar justify an enquiry into the trial court's refusal to set aside the verdict.

Second. It is urged that the motion for a new trial presented an issue of law. The argument is that on the motion or on the court's own initiative the verdict should have been set aside as inconsistent on its face, since if the plaintiffs were entitled to recover at all they were entitled to substantial, not merely nominal, damages. The case, it is contended, is comparable to one in which the award of damages exceeded a statutory limit, see *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80; or was less than an amount undisputed, *Glenwood Irrig. Co.* v. *Vallery*, 248 Fed. 483; *Stetson* v. *Stindt*, 279 Fed. 209; or was in pursuance of erroneous instructions on the measure of damages, *Chesapeake & O. Ry. Co.* v. *Gainey*, 241 U. S. 494, 496;[10] or was in clear contravention of the instructions of the trial court, *United Press Ass'n* v. *National Newspapers Ass'n*, 254 Fed. 284; compare *American R. R. Co.* v. *Santiago*, 9 F. (2d) 753, 757-758.

To regard the verdict as inconsistent on its face is to assume that the jury found for the plaintiff and failed to perform its task of assessing damages. The trial judge was not obliged so to regard the verdict. The defendant had insisted upon several defenses

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Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58 (1)), appellate procedure has been regulated by Rules of court. Compare Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 99 (f), as amended by 18 Geo. V, c. 26, § 8. The present Rules provide that applications for new trials are to be made to the Court of Appeal, which shall have the same powers on the hearing as it exercises on an appeal. See Annual Practice, 1933, Order 39, Rules 1 and 2.

[10]Compare, also, James v. Evans, 149 Fed. 136; East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., 249 Fed. 439; Eteepain Co-op. Soc. v. Lillback, 18 F. (2d) 912, 915.

and had set up a counterclaim. The plaintiffs were not entitled to a directed verdict. The evidence was voluminous; and, on some issues at least, conflicting. The instructions left the contested issues of liability to the jury. The verdict may have represented a finding for the defendant on those issues;[11] the reason for the award of nominal damages may have been that the jury wished the costs to be taxed against the defendant. The defendant did not complain of the verdict. The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict.[12] In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. Compare *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 334; *Dunn* v. *United States*, 284 U. S. 390, 394.

Third. It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inade-

[11]See Olek *v.* Fern Rock Woolen Mills, 180 Fed. 117; Vanek *v.* Chicago G. W. Ry. Co., 252 Fed. 871; Fulmele *v.* Forrest, 27 Del. 155. In a number of instances state appellate courts have taken this view of the verdict. Spannuth *v.* C. C. C. & St. L. Ry. Co., 196 Ind. 379; Hubbard *v.* Mason City, 64 Iowa 245; Wavle *v.* Wavle, 9 Hun 125; Snyder *v.* Portland Ry., L. & P. Co., 107 Ore. 673, 678-684; Krulikoski *v.* Sparling, 82 Wash. 474 (but see Bingaman *v.* Seattle, 139 Wash. 68, 72-73); see Haven *v.* Missouri R. R. Co., 155 Mo. 216, 223. Contra: Miller *v.* Miller, 81 Kans. 397; Bass Furniture Co. *v.* Electric Supply Co., 101 Okla. 293; see Johnson *v.* Franklin, 112 Conn. 228. Compare Pugh *v.* Bluff City Excursion Co., 177 Fed. 399, in which the jury returned a verdict for nominal damages after the trial court, upon the jury's request to rule on the propriety of this, gave an instruction couched in generalities.

[12]Compare Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Moquin, 283 U. S. 520, in which the trial court, expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial.

quate,[13] and the circuit courts of appeals have generally followed a similar polity.[14] Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine.

Fourth. The respondents contend that the District Court erred in charging that the measure of damages was the difference between the contract price and the market price at the time of the breach, instead of the market prices at the times for delivery; and that this error may be relied upon here in support of the judgment of the Court of Appeals. Compare *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435-436; *Langnes* v. *Green*, 282 U. S. 531, 538; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 561. There was no request for an instruction on this subject and no objection was made to that given until after the jury had retired. The trial judge was under no obligation to recall the jury. Moreover, the instruction given and the refusal to recall the jury were not assigned as error on appeal to the Court of Appeals; nor did that court mention the matter. Under the Rules of both the Court of Appeals and this Court the exception taken after the jury retired came too late to furnish a basis for review.[15] We have, therefore, no occasion to consider the meaning of the charge given, its correctness as a matter of law, or the materiality of the error, if any, in giving it.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

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[13]See Wilson *v.* Everett, 139 U. S. 616, 621; Herencia *v.* Guzman, 219 U. S. 44, 45; Southern Ry. Co. *v.* Bennett, 233 U. S. 80, 86-87; St. Louis & Iron Mt. Ry. Co. *v.* Craft, 237 U. S. 648, 661; Louisville & Nash. R. R. Co. *v.* Holloway, 246 U. S. 525, 529; and cases cited in note 4, *supra*.

[14]See cases cited in note 5, *supra*. Compare, however, Cobb *v.* Lepisto, 6 F. (2d) 128.

[15]See Rule 9, paragraph 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit; and Rule 8, paragraph 1, of the Rules of this Court. Also Phelps *v.* Mayer, 15 How. 160, 161; Hickory *v.* United States, 151 U. S. 303, 316; Ford Hydro-Electric Co. *v.* Neely, 13 F. (2d) 361.

SUPREME COURT OF THE UNITED STATES.

No. 314.—October Term, 1932.

Fairmont Glass Works, Petitioner, *vs.* Cub Fork Coal Company and Paragon Colliery Company, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 9, 1933.]

Mr. Justice Stone and Mr. Justice Cardozo, dissenting.

A verdict found in contravention of the instructions of the court may be reversed on appeal as contrary to law.

So much the prevailing opinion apparently concedes.

The verdict of $1 returned by the jury upon the trial of this cause may not be squared with their instructions and hence was properly annulled.

By the instructions of the trial judge they were required, if they found that the defendant had broken its contract, to award to the plaintiffs the difference between the contract price of the coal and its market value, after allowance for the defendant's counterclaim. The evidence most favorable to the defendant, both as to claim and counterclaim, made it necessary, if there was any breach, to return a substantial verdict, the minimum being capable of accurate computation. The distinction is not to be ignored between this case of a breach of contract and the cases cited in the prevailing opinion where the liability was in tort. Here the minimum, if not the maximum, damages are fixed and definite. There the discretion of the jury was not subject to tests so determinate and exact. The question is not before us whether even in such circumstances there may be revision on appeal. Cf. *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399. Enough for present purposes that in the circumstances of the case at hand the verdict for $1 is a finding that the contract had been broken, and this irrespective

of the motive that caused the verdict to be given. What the motive was we cannot know from anything disclosed to us by the record. Nothing there disclosed lays a basis for a holding that the nominal verdict for the plaintiffs was designed to save them from the costs which the law would have charged against them if there had been a verdict for defendant. The jury were not instructed as to the liability for costs, and for all that appears had no knowledge on the subject. Nor would such a motive, if there were reason to ascribe it, rescue them from the reproach of disobedience and error. It would merely substitute one form of misconduct for another. It would do this, moreover, in contradiction of the record. By no process of mere construction can a verdict that nominal loss has resulted from a breach be turned into a verdict that there had been no breach at all. On the face of the record, the jury found there was a wrong, and then, in contravention of instructions, refused, either through misunderstanding or through wilfulness, to assess the damages ensuing.

Justice is not promoted in its orderly administration when such conduct is condoned.